Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1249

JEAN L. WERNET,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

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JEAN L. WERNET,
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STATE OF MINNESOTA,
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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant appeals from the Judgment and Order of the Supreme Court of Minnesota, entered on October 24, 1978, denying Appellant's Petition for permission to appeal to the Minnesota Supreme Court from the Hennepin County District Court's Order, dated July 31, 1978, affirming Appellant's conviction in Hennepin County Municipal Court for operating a motion picture theater without a license, in violation of Minneapolis Code of Ordinances Chapter 367. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Order and Memorandum of the Hennepin County Municipal Court, filed September 22, 1976, denying Appellant's motion to dismiss the criminal complaint against her, based upon the unconstitutionality of the licensing ordinance, is not reported, and is set forth in the Appendix, *infra*, Appendix 1a-9a. The Order and Memorandum of the Hennepin County District Court, entered July 31, 1978, affirming Appellant's conviction in Hennepin County Municipal Court, is also not reported, and is set forth in the Appendix, *infra*, at 10a-15a. The Order of the Minnesota Supreme Court, entered October 24, 1978, denying Appellant's petition for permission to appeal from the Order affirming her conviction, is also not reported and is set forth in the Appendix at 16a.

JURISDICTION

The Order and Judgment of the Minnesota Supreme Court were entered on October 24, 1978, and Notice of Appeal was filed in that Court and in the Hennepin County Municipal Court[1] on January 17, 1979 (Appendix, *infra*, at 17a-18a. The jurisdiction of the Supreme Court to review this decision on appeal is conferred by 28 U.S.C. § 1257(2). The following decisions sustain the jurisdiction of this Court to review the Judgment on appeal in this case: *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Poulos v. State of New Hampshire*, 345 U.S. 395 (1953); *Jamison v. State of Texas*, 318 U.S. 413 (1943); *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928); and *Zucht v. King*, 260 U.S. 174 (1922).

[1] It was determined at this time that the Hennepin County Municipal Court is in fact the Court in possession of the record at the present time. See Rule 12, United States Supreme Court Rules.

STATUTES INVOLVED

Minneaplis Code of Ordinances §§ 367.010 et seq., which provide as follows:[2]

> "367.010. License Required. No person shall operate or conduct a legitimate theater or moving picture theater without being licensed under this chapter.
>
> 367.020. Application for License. Any person desiring a license under this chapter may file with the Department of Licenses and Consumer Services an application in writing. The application shall be in such form and require such information as the department deems reasonably necessary and shall contain the following:
>
> (1) The name and home address of the applicant;
>
> (2) The relationship of the applicant to the business;
>
> (3) The name and location of the business; and
>
> (4) The full name, residence and address, date of birth and place of birth of each applicant, owner, manager, partner (if partnership), officer

[2] During the pendency of this litigation, the City of Minneapolis renumbered its Code or Ordinance. The references in this jurisdictional statement will be to the old numbering system, which was in effect at the time the prosecution was commenced.

and director (if corporation), and other persons who will have charge, maintenance or control of the business or the premises.

367.025. Insurance requirements. Each applicant for a license under this chapter shall file with the City Clerk a public liability insurance policy or certificate of insurance from a company authorized to do business in Minnesota, insuring the applicant against any and all loss arising out of the use, operation or maintenance of the theater. The policy of insurance shall be in limits of not less than one hundred thousand dollars for injury or loss to one person, three hundred thousand dollars for injury or less to one person, three hundred thousand dollars for each occurrence, and fifty thousand dollars property damage. The policy or certificate shall contain an endorsement as provided by §300.17 under this Code of Ordinances. No cancellation of of any insurance policy shall be valid except upon thirty days prior written notice to the City. Failure to keep in full force and effect, insurance required herein is grounds for revocation of the license.

367.030. City Divided into Zones. For the purpose of licenses under this chapter, the City is divided into zones entitled Zone 1, Zone 2, and Zone 3, which shall consist of the following territory:

Zone 1. All that part of the City except that portion lying between the Mississippi River and the West side of Grant Street and between Fourth Avenue North and Fourth Avenue South.

Zone 2. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the Mississippi River and the east side line of Fourth Street.

Zone 3. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the west side line of Fourth Street and the east side line of Grant Street.

367.040. License Fee. The annual fee for licenses under this chapter shall be as shown in the following table.

LICENSING OF VARIOUS ACTIVITIES

Size of Theater	*Zone 1*	*Zone 2*	*Zone 3*
Up to 400 seats	$72	$95	$235
401 to 600 seats	95	118	279
601 to 1,000 seats	118	140	373
1,001 to 1,500 seats	140	189	467
1,501 to 2,000 seats	140	235	557
Over 2,000 seats	140	235	930

(Amended March 25, 1966.)
(Amended October 25, 1968.)
(Amended February 11, 1972)

367.050. Expiration Date. All licenses shall expire on October 1 of each year.

367.055. Denial of Application. An application may be denied, after notice and hearing thereon, for any of the following reasons:

(1) The application contains false, fraudulent or deceptive statements.

(2) The applicant has not complied with any provision of this chapter.

(3) The proposed operation is not in compliance with any law relating to zoning, health, fire building or safety requirements.

(4) The applicant or owner, manager, partner, officer or director of the business, has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a theater.

367.060. Revocation of License. Any license issued under this chapter may be revoked in accordance with §16, chapter 4 of the City Charter.

Conviction of the licensee or the licensee's principal employees for a violation of Minnesota Statutes, §617.291 through 617.297, or a conviction for a violation of the Minneapolis Code of Ordinances, §870.080, shall constitute grounds for suspension or revocation of the theater license.

Advertising by the licensee on the exterior of a theater by means of any picture, photograph, drawing, or similar visual representation, or image of a person or portions of the human body which depicts nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, as defined in Minn. Stat. §617.292 on any theater shall constitute grounds for suspension or revocation of the theater license."

QUESTIONS PRESENTED

1. Whether the Minneapolis Theater Licensing Ordinance is facially unconstitutional as an illegal prior restraint on

freedom of expression, as guaranteed by the first and Fourteenth Amendments to the United States Constitution, in that said Ordinance permits a denial of a motion picture theater license on grounds other than whether or not the building housing and theater meets applicable health, fire, building, safety and zoning standards, and further permits the exercise of discretion by government authorities over the exercise of First Amendment rights.

2. Whether the Minneapolis Theather Licensing Ordinance is facially unconstitutional, as an illegal prior restraint on freedom of expression, as guaranteed by the First and Fourteenth Amendment to the United States Constitution, in that said ordinance permits revocation of a motion picture theater license on the basis of prior obscenity convictions.

3. Whether the license fees imposed under the Minneapolis Theater Licensing Ordinance impose an unlawful prior restraint on the exercise of First Amendment rights within the City of Minneapolis, in that the record fails to demonstrate the fees assessed to be rationally related to the costs actually incurred by the City in legitimate regulation of the licensed activities.

4. Whether the disclosure provisions of the Minneapolis Theater Licensing Ordinance have a chilling effect on constitutionally protected freedom of expression, and therefore violate the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant Jean L. Wernet was convicted in Hennepin County Municipal Court on October 1, 1976, of operating

a theater without a license, in violation of Minneapolis Code of Ordinances §367.010, now renumbered §267.1800. The text of the ordinance in question is set forth in full, *supra.*

The prosecution of Appellant commenced with a criminal complaint issued by the Hennepin County Municipal Court. A copy of said complaint is set forth in the Appendix at 19a. The complaint which was sworn out by one Wallace Cecil of the Minneapolis Police Department Vice Squad, states that Cecil and Vice Squad Officer Schoeben on June 7, 1976, were in the vicinity of the Adonis Theater at 904 Hennepin Avenue in the City of Minneapolis and "observed said theater to be open for business to the public." The complaint further stated that the officers "knew that the theater had not been issued a license to operate. The officers entered and observed a party identified as Jean Louis Wernet, Defendant herein, seated behind the ticket counter. After the Defendant was advised of her rights, she stated to the officers that her employers told her that they could operate without a license."

Upon issuance of a formal written complaint, Appellant moved to dismiss the charges against her, on the basis of the unconstitutionality of the Minneapolis Theater Licensing Ordinance, as amended, and on the further grounds that the complaint failed to allege sufficient facts to enable a neutral and detached magistrate to determine that probable cause existed to believe that she had committed a violation of the ordinance in question.

Said motion was denied by the Honorable C. William Sykora, Judge of Hennepin County Municipal Court, in an Order and Memorandum filed September 22, 1976, and set forth in the Appendix at 10a-15a.

On October 1, 1976, the Defendant was convicted in a court trial in Hennepin County Municipal Court for operating a theater without a license, in violation of §367.010. From that conviction, Appellant appealed to Hennepin County District Court.[3]

On July 31, 1978, the Hennepin County District Court, by a three-judge appeal panel, affirmed Appellant's conviction in all respects, sustaining the validity of the ordinance against the constitutional challenges raised by Appellant in Municipal Court, and on appeal to District Court.

Appellant then proceeded to file a timely petition for permission to appeal to the Minnesota Supreme Court from the District Court.[4]

On October 24, 1978, the Minnesota Supreme Court denied Appellant's petition for permission to appeal "in as much as the Hennepin County District Court, upon appeal, fully considered the constitutional issues raised by the party . . . ." See Appendix at 16a.

From that Order, denying permission to appeal and sustaining the constitutionality of the Minneapolis Theater Licensing Ordinance, Appellant appeals, pursuant to 28 U.S.C. §1257(2).

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[3] In Minnesota, appeals from misdemeanor convictions proceed from Municipal or County Court to District Court. See Rule 28.01, subd. 2 of the Minnesota Rules of Criminal Procedure.

[4] In misdemeanor cases in Minnesota, a criminal defendant must obtain permission to appeal to the Minnesota Supreme Court from any appellate decision in the District Court. See Rule 29.02, subd. 6 of the Minnesota Rules of Criminal Procedure.

THE QUESTIONS ARE SUBSTANTIAL

I. The Minneapolis Theater Licensing Ordinance is facially unconstitutional as an illegal prior restraint on freedom of expression, as guaranteed by the First and Fourteenth Amendments to the United States Constitution, in that it permits denial of a motion picture theater license on grounds other than whether or not the building housing the theater meets applicable health, fire, building, safety and zoning standards, and further permits the exercise of discretion by government authorities over the exercise of First Amendment rights.

At the outset, it should be noted, that when the City of Minneapolis attempts to license the operation of motion picture theaters for legitimate theaters, the City is licensing an activity which the First and Fourteenth Amendments allow Petitioner to conduct as a matter of right. It is well settled that the right to freedom of expression, as guaranteed under the free press and free speech clauses of the First Amendment, made applicable to the states by the Fourteenth Amendment, includes the right to express one's self by means of motion pictures. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). Because the right to show motion pictures is constitutionally guaranteed, the authority of the City to license the showing of motion pictures is extremely limited.

One of the earliest decisions by this Court prohibiting the licensing of the First Amendment activities was *Lovell v. City of Griffin,* 303 U.S. 444 (1938). In that case, this Court held unconstitutional a Griffin, Georgia city ordinance prohibiting the distribution of circulars, hand-

books, or literature of any kind without first obtaining written permission from the City Manager. In holding the ordinance unconstitutional this Court declared:

> "We think that the Ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of freedom of the press by subjecting it to license and censorship. The struggle for freedom of the press was primarily directed against that power that John Milton directed his assault by his 'appeal for the liberty of unlicensed printing.' The liberty of the press became initially the right to publish '*without* a license what formerly could be published *with* one (emphasis in original, citation omitted.)' While this freedom from previous restraint on publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. (Citation omitted)."

Five years later, in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), this Court again declared unconstitutional any attempt to subject rights guaranteed by the First Amendment to the United States Constitution to the licensing power of the state. The case involved the constitutionality of a Jeantte, Pennsylvania ordinance requiring all persons canvassing or soliciting orders for merchandise of any kind within the city to pay a license fee and obtain a license, as the ordinance was applied to Jehovah's witnesses, who were selling religious books door-to-door.

In declaring the ordinance unconstitutional, as applied to Jehovah's Witnesses, this Court held the state was with-

out power to exact a license tax for the privilege of exercising rights which the Constitution of the United States guarantee. This Court stated:

> "It is one thing to impose a tax on the income of property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeanette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. (Citations omitted.) Those who can tax the exercise of this religious practice can also make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive the religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." *Id.* at 112.

This Court further stated:

> "It is a license tax – a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (citation omitted) although it may tax the property used in, or the income derived from that

> commerce, so long as those taxes are not discriminatory. (Citations omitted). A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down (citations omitted)." *Id* at 113.

In invalidating the license tax on the exercise of a First Amendment right, this Court did indicate that licenses could be imposed pursuant to regulatory schemes and taxes collected incidental to those regulatory schemes. However, the Court specifically noted that such regulation and fee schemes differ markedly from a license tax imposed for the privilege of exercising First Amendment rights.

> "The constitutional difference between such a regulatory measure and a tax on the exercise of a Federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce (citations omitted), it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. 'So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden.' (Citations omitted)." *Id.* at 114, footnote 8.

These principles of basic First Amendment laws have been clearly recognized by the Minnesota Supreme Court as far as the licensing of motion picture theaters is concerned. While recognizing that it is within the police power of the state to require a license as a condition precedent to the operation of a motion picture theater, *Franklin Theater Corp. v. City of Minneapolis*, 293 Minn. 591, 198 N.W. 2d 558 (1972), the Minnesota Supreme Court has also clearly recognized that the City's ability to require such a license is clearly limited by the First Amendment to the United States Constitution. In *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W. 2d 370 (1975); the court stated:

> "It has been suggested that the power of the City to grant or deny a license to operate a motion picture theater is coextensive with the power of the City to grant or deny a license to operate any other legitimate business. Proponents of this argument point to the fact that the City may deny a license to sell liquor or to operate a massage parlor to an applicant who has been convicted of a crime bearing a reasonable relationship to the business for which the license is sought. They argue by analogy that the City may also deny a license to operate a motion picture theater to any applicant who has been convicted of a crime relating to obscenity. However, when the City licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result, the power of the City is more limited than when the City licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor." 227 N.W. 2d at 372-373.

In a footnote to this quotation, the court further states:

> "There is no question that a municipality in determining whether or not to grant or deny a license to operate a motion picture theater may inquire to determine whether or not a theater meets authorized zoning, health, fire, building, and safety requirements." *Id.* at 373.

From these cases, a number of general principles are clearly apparent, as far as the City's ability to license a motion picture theater is concerned:

First of all, it is clear, that in the showing of motion pictures is a right constitutionally protected by the First Amendment, the City may neither license nor exact a fee for the privilege of showing motion pictures.

Secondly, the City does have a legislative interest in regulating motion picture theaters to assure that said theaters are housed in buildings which meet necessary health, fire, safety, and zoning standards.

Thirdly, any license fee charged by the City cannot be a fee for the privilege of showing motion pictures, since the showing of motion pictures is a right guaranteed by the First and Fourteenth Amendments to the United States Constitution. Any license fee must be reasonably related to the City's sole legitimate regulatory purpose, namely assuring that the buildings in whch motion pictures are shown meet legitimate zoning, health, fire, safety and building requirements.

Judged by these standards, the Minneapolis Theater Licensing Ordinance is clearly unconstitutional on its face. The ordinance licenses the very act of exercising a right

guaranteed by the First Amendment to the Constitution of the United States, and authorizes denial of licenses to exercise First Amendment rights for reasons going far beyond the necessary zoning, health, fire, safety and building requirements recognized by the Minnesota Supreme Court.

To begin with, the licensing ordinance clearly permits the City of Minneapolis to deny a motion picture theater license for reasons other than whether or not the building in which the theater is located meets applicable zoning, health, fire, building or safety regulations. Section 367. 055(2), taken in conjunction with §367.020(4), clearly permits the City Council to deny a motion picture theater license for failure of the applicant to disclose the residence address, full name, date and place of birth of each applicant, owner, manager, partner, officer, and director and all other persons who will have control over the management of the business conducted on the premises as a part of the theater license application. Section 367.055(1) further permits denial for any deceptive statement concerning ownership, management, or control of the premises. None of these regultions relate directly to zoning, fire, health, safety or building regulations, nor are they reasonably related thereto. Thus the Ordinance goes beyond the constitutionally limited purposes for licensing a motion picture theater, and said Ordinance is therefore unconstitutional.

An additional unconstitutional provision is that contained in §367.055(4), which authorizes denial of a motion picture theater license if any applicant, owner, manager, partner, officer or director of the business has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a threater. This provision, while superficially related to legitimate constitutional purposes, goes far beyond that which is necessary to enforce the state's legitimate regulatory purposes. In fact, the provision places the City on the horns of a dilemma. If the provision mandates the denial of a license to any person who has ever been convicted of any building, fire, or safety code regulation, the it would obviously prohibit for three years any persons from obtaining a motion picture theater license who had on one occasion negligently failed to update his fire extinguishers, or neglected to fix leaky pipes. Certainly no one could seriously argue that if the Minneapolis Star and Tribune Corporation were to be convicted of such violations, the state could legitimately deny the Star and Tribune Corporation the right to publish newspapers for a period of three years. Yet, this type of prior restraint on freedom of expression is precisely that which is authorized by §376.055(4).

On the other hand, if the provision is not construed as mandatory disqualification from receiving a license, it would be unconstitutional for another reason. If the section is construed as vesting discretion upon the City Council to deny a motion picture theater license to any person convicted of even the most minor building code violation, the provision is unconstitutional in that it leaves the decision to grant or deny the license to the discretion of a public official, something which the Court has previously prohibited. See *Lovell v. City of Griffin, supra,* 303 U.S. 444, 58 S.Ct. 666 (1938); *Staub v. City of Baxley,* 355 U.S. 313 (1958). Thus, if the Ordinance leaves the de-

cision to deny a license on the basis of building code violations to the discretion of the City Council, that very permission of discretion is unconstitutional as a prior restraint on freedom of expression under the above-cited decisions.

The Hennepin County District Court rejected this contention simply by stating that the grounds specified for denial "relate directly to the City's interest in its citizens' health and safety," and by further stating that the Ordinance does not "allow the unrestrained exercise of discretion found repugnant to the exercise of free speech." Memorandum of District Court, Appendix, p. 5a.

The argument of the District Court is anything but persuasive. To be sure the exercise of discretion is not "unrestrained," because a fire code or building code violation is necessary to trigger its exercise. However, it is undisputed that once a building or fire code violation occurs, the City Council has the absolute discretion to grant or deny a license for any reason whatsover, including reasons totally unrelated to health or safety, such as a dislike of the contents of the motion picture shown.

Moreover, the cases cited by Appellant prohibit far more than "the unrestrained exercise of discretion" in First Amendment cases. Perhaps the amount of discretion permitted in the First Amendment licensing area was best delineated by the United States District Court for the District of Kansas in *Swearson v. Meyers*, 455 F.Supp. 88 (D.Kan, 1978). In that case, the court granted a preliminary injunction enjoining the enforcement of a soliciting licensing ordinance in Kansas City, Kansas, as that ordinance was applied to members of the Unification Church who wished to solicit for religious purposes within the

City of Kansas City. Among the reasons for granting the preliminary injunction was a clear finding that the licensing ordinance in question permitted the exercise of discretion to grant or deny licenses in the First Amendment area. In discussing the amount of discretion constitutionally allowed to public officials in the First Amendment licensing area, the court stated:

> "Plaintiffs' argument that the Ordinance is constitutionally invalid because it lacks definite standards and vests discretion in City officials is supported by a long line of Supreme Court cases invalidating State or local licensing laws. (Citations omitted.) The common thread running through these opinions is that licensing laws governing conduct protected by the First Amendment are invalid unless they include precise, narrow, definite, and objective standards from which the appropriate official must make his decision to grant or deny the license application. The cases cited above seem to deal exclusively with licensing laws held invalid, and except in a negative fashion do little in teaching what 'standards' would be constitutionally adequate. It is clear, however, that the stancards must be more than mere criteria or guidelines; they must be complete in and of themselves, and leave no factors to be assessed, judgments to be made, or discretion to be exercised by the appropriate licensing official. In other words, *the decision to grant or deny the license application must be virtually a ministerial one* (emphasis in original.)" *Id.* at 91.

Thus, the test of the constitutionality of a First Amendment licensing ordinance is not whether or not there is "un-

restrained exercise of discretion," as found by the District Court, but rather whether the license application process has sufficiently definite and objective criteria so that the decisions to grant or deny an application is "virtually a ministerial act." Certainly, the decision as to whether or not a theater should be granted or denied a license, because of a past fire code violation of a single one of the theater's employees, without any guidelines as to the exercise of that discretion, it is certainly not a ministerial act. It is precisely the kind of grant or discretion which would allow denial of license based upon content of films shown, and would thus render the ordinance unconstitutional.

II. The Minneapolis Theater Licensing Ordinance is further unconstitutional, on the grounds that it permits revocation of a motion picture theater license on the basis of prior obscenity convictions.

An even more blatant prior restraint on First Amendment freedoms than that contained in the denial provisions of the licensing ordinance is that contained in the revocation provision. Section 367.060 permits the revocation of a motion picture theater license upon the conviction of the licensee or any of the licensee's principal employees for a violation of Minn. Stat. § 617.291 through 617.297, statutes which relate to the exhibition of explicit sexual material to minors, or conviction for a violation of Minneapolis Code of Ordinances § 870.080, the city ordinance prohibiting the sale or display of obscene materials.[5] Therefore, even if an application is granted a license, regardless of any prior convictions, if, during the course of his operation of the theater, he, or any of his principal employees, are convicted of any violation of the city obscenity ordinance or the state statutes concerning the exhibition of sexually explicit materials to minors, the license may be revoked or suspended.

[5] The complete texts of these statutory provisions is set forth in the Appendix at 21a-26a.

Such a provision is directly in conflict with the decision of the Minnesota Supreme Court in *Alexander v. City of St. Paul, supra,* 303 Minn. 201, 227 N.W.2d 370 (1975). In that case the Minnesota Supreme Court unanimously held that St. Paul City Ordinance § 372.04(g) which permits revocation of a motion picture theater license upon any conviction of the theater or its employee of any state, federal or local law involving obscenity, to be unconstitutional as a prior restraint on freedom of expression. In declaring the ordinance to be unconstitutional and reversing the City Council's revocation of a theater license, the Minnesota Supreme Court stated:

> "The remedy presently available to the City of St. Paul for Plaintiff's past abuses lies not in the suppression of the right to show all films, but in criminal prosecutions for violation of constitutional obscenity laws. The risk that criminal sanctions will be insufficient to deter future violations of the Ordinance cannot justify the City's attempt to revoke Plaintiff's license in the face of his right to the free speech guaranty of the First Amendment." 227 N.W. 2d at 373.

The holding of the Minnesota Supreme Court is consistent with the overwhelming weight of judicial authority in other jurisdictions on this issue. See *Perrine v. Municipal Court,* 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied,* 404 U.S. 1038; *City of Seattle v. Bittner,* 81 Wash. 2d 747, 505 P.2d 126 (1973); *Avon 42nd Street Corp. v. Myerson,* 352 F.Supp. 994 (1972); and

People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 642, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), *cert. denied, sub nom. Van de Kamp v. Projection Room Theater,* 429 U.S. 922 (1976).

The Hennepin County District Court rejected these arguments, not on their merits, but rather by holding that because Appellant was not directly affected by the revocation provisions, she lacked standing to challenge the constitutionality of those provisions. The Distrct Court held that revocation provisions could be challenged only "when interdependent with remaining statutory sections or where the revocation section contributes to the infirmity of other sections."

This argument is unpersuasive for two reasons, and should be reversed by this Court on appeal.

First of all, even under the standard enunciated by the District Court, Appellant's standing to challenge the revocation provisions is clear. The District Court concedes that if the revocation provision is interdependent with remaining statutory sections or if the revocation provision contributes to the infirmity of other sections, then Appellant would have standing to challenge the revocation provision. The record in this case clearly establishes that to be the case here. In the Municipal Court, Judge Sykora specifically upheld the constitutionality of the disclosure requirements contained in the theater licensing ordinance, requiring that the identities of all owners, managers, and directors to be disclosed, solely on the basis of the City's need to enforce the revocation provisions. See Memorandum of Judge Sykora, Appendix p. 15a. Neither the District Court nor the City below challenged Appellant's standing to challenge the disclosure provisions was to enable the City to enforce its revocation provisions, then it is clear that the revocation provisions are interdependent with the disclosure provisions

and contribute to the unconstitutionality of the disclosure provisions. As such, Appellant clearly has standing to attack the revocation provisions.

Secondly, persuasive policy reasons exist for holding that the Appellant and others similarly situated have standing to challenge such unconstitutional revocation provisions.

To begin with, there seems to be little rational basis for distinguishing between a defendant having the standing to raise an unconstitutional condition for obtaining a license in this proceeding, while not permitting him to raise the issue of an unconstitutional condition for the maintenance or retention of a license. Secondly, the very record before the Court in *Alexander v. City of St. Paul, supra,* dictates the desirability for raising the constitutionality of a revocation provision prior to actual revocation. In *Alexander,* the license in question was revoked on July 19, 1974, and, except for a brief 15-day period in which the court issued a temporary restraining order, the theater was, in fact closed, unconstitutionally, between July 19, 1974, and February 28, 1975, the date on which the Minnesota Supreme Court finally rendered its decision holding the initial revocation to be unconstitutional. As a result of not raising the issue of the unconstitutionality of the revocation until a revocation actually occurred, the plaintiff in *Alexander* was forced to close a theater for nearly six months, when the reason for closing was actually unconstitutional.

Such a loss of First Amendment rights should not be necessary in order to challenge a revocation provision as clearly unconstitutional as the one in the Minneapolis Ordinance.

III. The Minneapolis Theater Licensing Ordinance is further unconstitutional because the fee system imposes an unlawful prior restraint on the exercise of First Amendment rights within the City of Minneapolis, and further denies to certain theaters equal protection of the laws, under the Fourteenth Amendment.

As noted by this Court as early as the *Murdock* case, no license fee may be charged for the privilege of exercising a right which the constitution guarantees. Any fee must be related to a legitimate regulatory scheme, which incidentally may touch upon protected First Amendment rights, and the fee may be no greater than that which is reasonably necessary to reimburse the government for its actual costs in implementing any necessary regulatory scheme. As applied to the licensing of motion picture theaters in Minneapolis, the constitutionally required standard must be that the City may not charge any license fee for the privilege of operating a motion picture theater per se, but rather may charge only that fee which is necessary to reimburse the City for its actual expenses incurred in assuring compliance with a legitimate regulatory scheme to-wit: assuring that the buildings in which theaters are housed meet necessary zoning, health, fire, safety, and building regulations. By contrast, the fee schedule set forth in the Minneapolis Theater Licensing Ordinance is a license tax on the exercise of First Amendment rights, and is totally unrelated to any actual expenses incurred in assuring compliance with a legitimate regulatory scheme of the City. This is revealed by a simple look at the fee schedule set forth in the licensing ordinance. According to that schedule, a 2,000-seat theater located in Zone 3 of the City must pay a license fee nearly thirteen times greater than that required for a 400-seat theater located in Zone 1. Certainly, the

City cannot reasonably contend that it is thirteen times more expensive to inspect a 2,000-seat theater in Zone 3 for fire, health, safety, building, and zoning requirements, as it is to inspect a 400-seat theater in Zone 1 and the identical building, with the same number of seats located in Zone 3. The Zone 3 theater is more than four times as expensive to license. Clearly, it cannot reasonably be asserted that it is four times as expensive for a building or fire inspector to enforce health, fire, safety, building, or zoning requirements for the same building in one section of the city than it is for another section of the city. The license scheme is therefore totally unrelated to reimbursing the City for its reasonable expenses in performing a legitimate regulatory scheme, and rather constitutes an unconstitutional license tax on the privilege of conducting an activity which the First Amendment to the United States Constitution guarantees.

The Hennepin County District Court rejected this argument by stating the following:

> "An analysis of the present license scheme reveals that the variable fees charged are reasonably related to the variation in cost incident to licensing different size theaters in different areas of the city. Distinctions made regarding cost differences are not arbitrary and are therefore valid. Similarly, the amount of fees charged reasonably estimates costs and any revenue is identical to estimation of expenses in ordinance enforcement.' Dist. Ct. Memorandum, Appendix p. 7a.

The following finding of the District Court was utterly without support in the record of this case. In fact, the Municipal Court, by Judge Sykora, made precisely the opposite finding as to the showing the City had made to jus-

tify the ordinance. Judge Sykora wrote, "No explanation was offered by the state as to why the enforcement of the regulations by inspection or otherwise would vary dependent upon the location or size of the theater . . . ." Mun. Ct. Memorandum, Appendix p. 14a.

In reaching the decision it did, the Hennepin County District Court, and, the Minnesota Supreme Court, in its refusal to consider the case on appeal, rejected the virtually unanimous weight of judicial authority on determining the reasonableness of license fees in the First Amendment area. To be sure, the general proposition of law is that courts will presume the reasonableness of a license fee, unless the party challenging the fee comes forward with evidence or facts indicating the fee to be manifestly unreasonable and beyond the discretion of the licenseing authority. See, for example, *Minneapolis-St. Paul Ry. Co. v. City of Minneapolis*, 326 Minn. 109, 52 N.W. 2d 120 (1952). However, when the licensing ordinance regulates activity entitled to the protection of the First Amendment, the courts which have ruled on the question have clearly stated that a different presumption and different burden of proof applies.

In this regard, the leading case is *Busey v. District of Columbia*, 78 U.S. App. D.C. 189, 138 F.2d 592 (1943), a case involving the constitutionality of a Federal statute licensing vendors in Washington, D.C. In that case, the United States Court of Appeals originaly upheld the constitutionality of the licensing statute. The United States Supreme Court vacated that judgment, in light of its decision in *Murdock v. Pennsylvania, supra.* See *Busey v. District of Columbia*, 319 U.S. 579 (1943). On remand, the United States Court of Appeals for the District of Columbia Circuit reversed its prior decision and invalidated the vendor's licensing statute. It based its decision, in part, on a holding that

no showing of the reasonableness of the license fee charged had been made. In doing so, the court clearly held that in First Amendment cases, the government has the burden of proof of demonstrating the reasonableness of the license fee. The court stated:

> "We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. In many contexts it is both rational and convenient to presume 'the existence of facts supporting the legislative judgment.' But it would be neither rational or convenient to presume that the uniform fee by which Congress has sought to cover the cost of policing all sorts of street sales happens not to exceed the cost of policing the particular sort involved here.
>
> The case comes to this. The argument in *Opelika*[6] and *Murdock* implies that a regulatory license fee which exceeds the cost of policing

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6 The Court is referring to *Jones v. City of Opelika*, 319 U.S. 103 (1943), a companion case decided with *Murdock v. Pennsylvania, supra.* The decision vacated an earlier decision of this Court upholding the constitutionality of a municipal solicitation licensing ordinance. See *Jones v. City of Opelika*, 316 U.S. 584.

> sales of religious propaganda is a prohibited interference with the freedoms of speech, press, and religion. There is no evidence, and no clear probability that the District of Columbia license fee does not exceed the cost of policing these sales. No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." 318 F.2d at 595-596.

Other courts which have dealt with the reasonableness of license fees in the First Amendment area have followed the approach of the District of Columbia circuit in the *Busey* case. For example, in *Chester Branch of the N.A.A.C.P. v. City of Chester,* 253 F. Supp. 707 (E.D. Pa. 1966), the court invalidated a Chester, Pennsylvania ordinance requiring a permit for the use of a sound truck, and a $25 fee for obtaining the permit, when the government, in dealing with a case in volving First Amendment rights, produced no evidence to demonstrate that the actual cost of issuing the permit and enforcing the permit licensing ordinance itself was related to the level of the license fee. Similarly, in *New York Times Inc. v. Arizona Board of Regents,* 20 Ariz. App. 422, 513 P.2d 960 (1973) the court invalidated a University of Arizona regulation licensing the distribution of newspapers on campus, and imposing a $2.00 per newsstand license fee, in the absence of any proof that the license fee imposed bore any reasonable relationship to the expenditures actually incurred by the University.

Thus, courts in other jurisdictions which have considered the subject have clearly indicated that when the governmental authority fails to come forward with any evidence to support the reasonableness of its license fee, when that license fee covers First Amendment activity, the court is obligated to strike

down the fee as an unconstitutional tax on the exercise of First Amendment privileges.

Moreover, other courts have clearly held that when government adopts a classification scheme under which certain persons or groups of persons are granted more fundamental rights, such as First Amendment rights, than are other groups or persons, such a classification scheme may be justified only if the state establishes a compelling state interest to support the classification. See *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Skinner v. Oklahoma,* 316 U.S. 545 (1942); *O'Neill v. Dent,* 364 F. Supp. 565 (E.D.N.Y. 1973); and *Salem Inn, Inc. v. Frank,* 381 F. Supp. 859 (E.D.N.Y. 1974), affirmed, 522 F.2d 1045 (2d Cir. 1975).

Thus, when the City failed to set forth any evidence at all to justify the reasonableness of the license fee or the disparity in fees, it failed to meet its burden of proof to justify a license fee in a First Amendment area. It further failed to set forth any evidence establishing anything remotely approaching a compelling state interest to support a classification under which some persons are granted the right to exercise First Amendment rights at a substantially lower price than others. In fact, far from making any showing of a compelling state interest, the city, as the Municipal Court noted, offered no explanation whatsoever as to the wide variation of the license fees. Clearly, in the absence of any explanation or any evidence in the record, the only conclusion that can reasonably be reached is that the city's burden of establishing the reasonableness of the fee and the compelling state interest to justify the disparity in fees, has not been met in this case. As a result, the fee system must be declared unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution.

IV. The Minneapolis Theater Licensing Ordinance is further unconstitutional, in that it has a chilling effect on constitutionally protected freedom of expression, and therefore violates the First and Fourteenth Amendments to the United States Constitution.

Apart from the fact that the Minneapolis Theater Licensing Ordinance permits the denial of a motion picture theater license on grounds other than whether or not the building in which the theater is housed meets applicable zoning, health, fire, safety, and building regulations, the Ordinance is further unconstitutional in that an additional stated ground for denial of a motion picture theater license is one which has been specifically prohibited by the courts as a precondition to the exercise of First Amendment rights. That additional condition is the requirement that an applicant for a theater license as a pre-condition to being allowed to operate a motion picture theater, disclose to the City of Minneapolis the identities of all owners, partners, operators, or employees having anything to do with the management or operation of said motion picture theater. For years, this Court, and various lower courts, have held that such requirements, which demand public identification as a prerequisite to the exercise of First Amendment rights, are unconstitutional as having a chilling effect on the exercise of such rights.

In *Talley v. California*, 362 U.S. 60 (1960), the United States Supreme Court invalidated a Los Angeles city ordinance prohbiting the distribution of handbills or circulars, unless the names and addresses of the persons causing the handbills to be circulated were printed thereon. In declaring the requirement of identification of authors and distributors to be unconstitutional, this Court clearly indicated that the freedom of speech and freedom of the press pro-

visions set forth in the First Amendment to the United States Constitution include the right of the individual to speak and print anonymously. This Court declared:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as much essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ovell v. Griffin*, 303 U.S. at 452.
>
> Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing laws of England, which was also enforced on the colonies was due in part to the knowledge that exposure of the names of the printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers . . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.
>
> We have recently had occasion to hold in two cases that there are times and circumstances when

states may not compel members of groups engaged in dissemination of ideas to be publicly identified. *Bates v. Little Rock,* 361 U.S. 516; *National Association for the Advancement of Colored People v. Alabama,* 357 U.S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of matters of public importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia ordinance is void on its face." 362 U.S. at 64-65.

Relying on the decision of the United States Supreme Court in *Talley,* the New York courts invalidated a similar ordinance in *People v. Mishkin,* 17 A.D. 2d 243, 234 N.Y.S. 2d 342 (1st Dept. 1962), affirmed without opinion, 15 N.Y. 2d 671, 255 N.Y.S. 2d 881, 204 N.E. 2d 209 (1964). That case involved the enforcement of the state's general business law which provided that every publication other than newspapers and magazines should "conspicuously have imprinted . . . the true name and address of the publisher or printer." The court held that under the rationale imposed by the United States Supreme Court in the *Talley* decision, the requirement of identification of printers and publishers was unconstitutional as having a chilling effect on freedom of expression.

The same rationale for invalidating laws requiring identification of proponents of material protected by the First Amendment was voiced by this Court in *Lamont v. Postmaster General,* 381 U.S. 30, (1965), in which this Court invalidated §305(a) of the Postal Service and Federal Employees Salary Act of 1962, which allowed for the detention by the Secretary of the Treasury of materials deemed to be "communist political propaganda," to be delivered

only if the named addressee specifically requested said materials. The narrow ground for invalidating the statutory provision is the belief by the Court that to require the addressee of material protected by the First Amendment to identify himself to the government before he would be allowed to receive such material would violate the addressee's rights under the First and Fourteenth Amendments to the United States Constitution. In *Lamont,* therefore, the Court recognized not only a right to speak and publish anonymously but a right to receive materials protected by the First Amendment anonymously.

Similarly in *Zwickler v. Koota,* 290 F.Supp. 244 (E.D. N.Y. 1968), rev. sub. nom. *Golden v. Zwickler,* 394 U.S. 103, a three-judge United States District Court panel invalidated a New York statute making it a crime to distribute for another any handbill containing any statement concerning any candidate in connection with any election, unless the name and post office address of the printer and the person on whose instance the handbill was distributed was contained thereon. The court relied on the *Talley* and *Mishkin, supra,* in reaching its decision. The reversal of the three-judge court by this Court was based, not on a disagreement on the merits of the case, but rather upon the belief that the merits should not be heard by the District Court because the case had become moot.

In *Strassver v. Doorley,* 432 F.2d 567 (1st Cir. 1970), the Court invalidated a Providence, Rhode Island ordinance requiring that a "bootblack or newsboy" register with the Bureau of Licenses and obtain a permit to operate, and further requiring anyone holding such a permit to wear a hat or cap containing a numbered metal badge provided by the city upon payment of a $.50 deposit. The Plaintiffs in the case were individuals attempting to sell "an al-

legedly offbeat newspaper entitled *Extra.*" In holding the ordinance unconstitutional the Court declared:

> "Hence, the only question is whether the physical acts of registering and procuring and wearing a badge can constitutionally be required of a newspaper vendor under what remains of the ordinance. If we were to find this permissible, Plaintiffs would be required to open themselves to possible identification as the ones associated with *Extra,* to deposit $.50 with the City, and possibly to suffer the felt stigma of having to display a button. In face of these burdens upon the exercise of First Amendment rights, Defendants point to no governmental interest of any importance that would be served by registration and identification. We therefore hold these requirements of the ordinance, like its other provisions, unconstitutional."

Two years later, the same court held an almost identical ordinance from another city to be unconstitutional, relying on *Talley v. California, supra.* See *Wulp v. Corcoran,* 454 F.2d 826 (1st Cir. 1972).

A similar situation was addressed by the Seventh Circuit in *Jacobs v. Board of Commissioners,* 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975). In that case, the court invalidated a school regulation prohibiting students from distributing any literature within the school "unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself." In holding the regulation to be invalid, the Court declared:

> "Anonymous student publications performed similarly within the student community; without

> anonymity, without fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. Although the rule leaves students free to distribute anonymous literature beyond the schoolhouse gate, the question here as in *Tinker,* is whether the state has demonstrated a sufficient justification for this prohibition within the school community, where students and teachers spend a significant portion of their time. (Citations omitted). Defendants contend that the names of persons who have 'participated in publication' of literature must be provided so that those responsible for publications of libelous or obscene articles can be held accountable. However, here as in *Talley,* the requirement is not limited to material as to which such justification might be urged. Indeed, if the regulation be read literally, 1.3.1.6 applies only to literature the contents of which is acceptable. School authorities could not reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school authorities or discipline." 490 F.2d at 607.

It should also be noted that this decision was vacated by this Court, not as a result of any disagreement as to the merits of the decision, but rather because the plaintiff students in question had graduated from school, making their claims moot.

Even more recently, a three-judge Federal court in printing industries of *Gulf Coast v. Hill,* 382, F.Supp. 801 (S.D. Tex. 1974), stay granted, 419 U.S. 805, prob. jur. noted, 419 U.S. 1088, vacated, 422 U.S. 937 (1975), invalidated

and enjoined enforcement of a Texas statute requiring all printed or published political advertising to have printed on it the name and address of the printer and the person paying for the advertising. Again, the judgment was vacated by this Court. However, the vacation of the judgment was not based on the merits of the case, but rather because of the fact that during the pendency of the litigation, the Texas legislature had amended the statute in question, and the Court remanded the case for further consideration in light of the amended statute.

The only instance in which this Court has upheld disclosure requirements, as applied to the exercise of First Amendment rights was in *Buckley v. Valeo,* 424 U.S. (1976). In that case, this Court considered various challenges to certain provisions of the Federal Election Campaign Act of 1971, as amended in 1975, including statutory requirements that the candidates for election to Federal office disclose the identities of contributors to their campaigns. Even though this Court upheld the constitutionality of the disclosure requirements this Court noted:

> "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since (NAACP) v. Alabama we have required that the subordinating interests of the state must survive exacting scrutiny. (Citations omitted). We have also insisted that there be a 'relevant correlation' (citation omitted) or 'substantial relation' (citation omitted) between the governmental interest and the information required to be disclosed (citation omitted). This type of scrutiny is necessary even if any deterrent effects on

> the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." 424 U.S. at 64-65.

However, this Court noted that weighed against the legitimate claims of the plaintiffs were compelling governmental interests in support of disclosure. This Court stated:

> "The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is being spent by the candidate' in order to aid the voters in evaluating those who seek Federal office. . . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return . . . .
>
> Third, and not least significant, record keeping, reporting, and disclosure requirements are an essential means of gathering that data necessary to detect violation of the contribution limits described above." 424 U.S. at 66-67.

Finally, this Court noted that the disclosure requirements in the Federal Election Law were clearly distinguishable

from the ordinance invalidated in *Talley v. California, supra:*

> "The ordinance found wanting in *Talley* forbade all distribution of handbills that did not contain the name of the printer, author, or manufacturer, and the name of the distributor. The city urged the ordinance was aimed at identifying those responsible for fraud, false advertising, and libel, but the Court found that it was 'in no manner so limited.' 362 U.S. at 64, 80 S.Ct. 536, 4 L.Ed. 2d 559. Here, as we have seen, the disclosure requirement is narrowly limited to those situations where information sought has a substantial connection with governmental interests sought to be advanced." 424 U.S. at 81.

By contrast, in the instant case, there is no showing that the disclosure of the manager, directors, partners, and all employees involved in the operation of a motion picture theater is in any way related to any of the legitimate governmental interest involved in licensing a motion picture theater nor is the ordinance itself so limited.

Certainly, the Municipal Court Order and Memorandum upholding the constitutionality of this particular provision of the Ordinance is unpersuasive. In upholding the constitutionality of the disclosure requirements Judge Sykora wrote:

> "It may be that disclosure of the names and addresses required by §(367.020) has a chilling effect upon such person (sic) exercising their right of freedom of speech. It would also have a deterring effect upon a desire to violate the criminal laws referred to in §(367.060) of the Ordinance. The latter overrides and take priority over the former." Memorandum of Judge Sykora, Appendix p. 14a-15a.

Therefore, the only justification set forth by Judge Sykora for requiring the disclosure of names, addresses, date of birth, and place of birth of all owners, operators, managers, partners or employees having managerial duties is that such disclosure will enable the City to invoke the provisions of §367.060, involving revocation of licenses for commission of crimes related to obscenity and exhibition of sexually explicit materials to minors. However, as has already been pointed out, *supra,* that section is clearly unconstitutional in light of the decision of the court in *Alexander v. City of St. Paul, supra,* 303 Minn. 201, 227 N.W. 2d 370 (1975). Given the fact that the revocation section is itself unconstitutional, the fact that disclosure would assist in enforcing the revocation section certainly in no way operates to salvage the constitutionality of the disclosure requirements. In fact, if the purpose of the disclosure requirements is to enforce the unconstitutional revocation section, that fact should in and of itself invalidate the constitutionality of the disclosure requirements.

In fact, given the fact that the City's only legitimate interest in licensing a motion picture theater is to assure that all applicable zoning, health, fire, building and safety codes are observed, there can be no legitimate interest in the broad disclosure requirements contained in the licensing ordinance. The zoning, fire, health, safety, and building requirements all go to the physical structure of the building itself, not the operation of the motion picture theater. Therefore, all such requirements can clearly be enforced against the fee owner of the real property in question, which is a matter of public record. Moreover, such provisions can also be enforced against any person who makes

a license application on behalf of the theater. The disclosure of every person having anything to do with the theater in any capacity is in no way required to enforce these provisions. The mere requirement of a named person to contact concerning structural deficiencies of the building would more than suffice for the enforcement of any of the City's legitimate purposes in licensing. Therefore, it is unconstitutionally overbroad to demand as a precondition to the exercise of a First Amendment right that the identities of all persons involved in the operation of a motion picture theater be disclosed to the City.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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Attorney for Appellant

January 19, 1979

APPENDIX A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

State of Minnesota,
Plaintiff,

vs.

File No. 66894

Jean L. Wernet,
Defendant.

O R D E R

The above-entitled matter came on for hearing before the undersigned judges sitting as an appeal panel of the District Court, on May 12, 1978 at the Hennepin County Government Center.

Randall D. B. Tigue, Esq., appeared on behalf of defendant-appellant Jean L. Wernet, and Mary M. Wahlstrand, Esq., Assistant Minneapolis City Attorney, appeared on behalf of plaintiff-respondent State of Minnesota.

The Court, having heard the arguments of counsel and having considered all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the Judgment of the lower court be, and the same hereby is, affirmed.

BY THE COURT:

/s/ Harold Kalina
Harold Kalina

/s/ A. Paul Lommen
A. Paul Lommen

/s/ James H. Johnston
James H. Johnston

Dated this 31st day
of July, 1978

Attached Memorandum to be made part of above Order.

MEMORANDUM

The defendant, Jean L. Wernet, appeals from a Municipal Court conviction for operating a motion picture theater without a license in violation of Minneapolis Ordinance § 267.1800 (previously numbered 367.010). The defendant was arrested on June 7, 1976 while she was seated at the ticket counter of the Adonis Theater. The trial court specifically held that the Adonis Theater was operating without a license and that the defendant was an employee of the theater.

In pre-trial motions the defendant challenged both the factual sufficiency of the criminal complaint and the constitutionality of the Minneapolis Theater Licensing Ordinance. Both motions were decided against the defendant with the court specifically finding Minneapolis Ordinance § 267.1800 - .1870 constitutional.

On appeal the defendant raises three major issues. First, the constitutionality of the ordinance is again attacked by claiming that it is an impermissible prior restraint on the defendant's freedom of expression. Secondly, because the defendant was merely an employee, and thereby had no obligation to obtain a theater license, the defendant alleges that there is insufficient evidence to sustain the conviction. Finally, defendant challenges the trial court's evidentiary ruling that the defendant could not inquire into previous license applications of the Adonis Theater.

THEATER LICENSING ORDINANCE

The appellant attacks the constitutionality of the theater licensing statute on the grounds that the provisions for license denial grant impermissibly broad discretion to the licensing authority; that the disclosure provisions of the statute are too broad; and the grounds stated for license revocation are an abridgment of appellant's First Amendment right of free speech.

This Court, for the reasons which follow, finds that the licensing authority's discretion is adequately circumscribed to prevent abuses and that the ordinance's disclosure requirements are substantially related to a legitimate government interest.

Additionally, this Court finds that the appellant lacks the requisite standing to challenge the ordinance's revocation provisions, and, therefore, the validity of this ordinance section is not addressed.

Expression by motion picture has consistently been held to be a protected form of speech for which the state could, under its police powers, require a license. *See, Young v. American Mini Theaters,* 427 U.S. 50 (1976). The most recent Minnesota consideration of the inherent conflict between the freedom of speech and licensing restrictions is found in *Alexander v. City of St. Paul,* 303 Minn. 201, 227 N.W.2nd 370 (1975), where the Court stated:

> It has long been recognized that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. However, it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. Thus, it is within the police power of the state to require a license as a condition precedent to the operation of a motion picture theater, under statutes and ordinances which set forth definitive, objective guidelines for the issuance of licenses so that the decision to grant or deny a license is not left to the discretion of a public official (citations omitted).
> *Id.* at _____, 227 N.W.2d at 372.

Our courts have recognized, therefore, that there are governmental interests, such as the health and safety of the public, which allow certain restrictions on free expression. These restrictions usually take the form of licensing ordinances which, under the *Alexander* test, must be definite and objective so as to preclude discretionary abuse in their operation. *Accord, Shuttleworth v. Birmingham,* 394 U.S. 147 (1969). We must, therefore, consider whether the Minneapolis Ordinance has sufficient guidelines to preclude the abuse of discretion.

The Minneapolis Ordinance sufficiently circumscribes the discretionary powers of the City Council by delineating four specific grounds for which a theater license may be denied. *See,* Minneapolis Ordinance § 267.1855. The routine approval of licenses do not require the affirmative action of the City Council but rather are automatic, with license denial requiring notice and a hearing. Additionally, the grounds specified

for denial relate directly to the City's interest in its citizens' health and safety. The Minneapolis Ordinance does not, therefore, allow the unrestrained exercise of discretion found repugnant to the exercise of free speech. *See, e.g., Southeastern Promotions, LTD. v. Conrad,* 420 U.S. 546, 554 (1975); *Lovell v. Griffin,* 303 U.S. 444 (1938).

The Minneapolis Ordinance is also attacked as being overbroad in requiring "the full name, residence address, date of birth of each applicant, owner, manager, partner, officer and director, and other persons who will have charge, management or control of the business or the premises." Minneapolis Ordinance § 267.1820 (4). This disclosure requirement, the appellant asserts, without specific proof, will result in a "chilling effect" on theater owners' exercise of First Amendment rights. Disclosure requirements must, after exacting judicial scrutiny, establish a relevant correlation or substantial relation between the disclosed information and the governmental interest. *See, e.g., Buckley v. Valeo,* 46 L. Ed. 2d 659, 713 (1976).

In the instant case the names of the corporate officers or persons managing the premises are required in order to insure the government can enforce its health and safety interests.

This Court finds that there is a substantial relation between the protection of the public using theater facilities and the disclosure of those responsible for proper operation of these establishments.

Where the rights of an individual are not directly affected or prejudiced by a licensing statute, or by a particular feature of the statute, he may not challenge the statute's constitutionality. *See generally,* 16 C.J.S. Constitutional Law § 76, p. 241 (1956).

In the present case the appellant is not adversely affected in any manner by the revocation provisions. The courts have, however, allowed constitutional assaults on licensing statutes by those who have not applied for a license and whose conduct, under a properly drawn statute, would clearly be prohibited. *See, e.g., Freeman v. Maryland,* 380 U.S. 51 (1965). An analysis of *Freeman* and its progeny reveal that such statute challenges were made against the license qualification or denial provisions and not independently against revocation provisions. *See, e.g., Shuttleworth v. Birmingham,* 394 U.S. 147 (1969). Revocation provisions were challenged only when interdependent with remaining statutory sections or where the revocation section contributes to the infirmity of other sections. Neither of these requisites are present in the instant case. Therefore, the appellants' challenge of the Minneapolis Ordinance must be restricted to denial provisions.

A similar situation existed in *Starr v. Preller,* 352 F. Supp. 530 (1972), *vacated on other grounds,* 413 U.S. 905 (1973), where a three judge panel restricted the plaintiff's statutory challenge to only those licensing provisions directly affecting the non-licensed ordinance violator. This restriction excluded revocation sections from consideration as the plaintiff lacked standing.

Similarly, Mrs. Wernet should be able to attack the Minneapolis Ordinance but only as to those portions of the statute which directly affect her. The revocation provisions do not.

The appellant further asserts that the theater licensing fee schedule, established by Minneapolis, is impermissible in its classification and amount. To be valid a licensing scheme must be reasonably related to the costs incident to the in-

suance of licenses and enforcement of the ordinance. *See, e.g., Lyons v. City of Minneapolis,* 241 Minn. 439, 63 N.W.2d 585 (1954). An analysis of the present license scheme reveals that the variable fees charged are reasonably related to the variations in costs incident to licensing different size theaters in different areas of the city. Distinctions made regarding cost differences are not arbitrary and are therefore valid. Similarly, the amount of fees charged reasonably estimates costs and any revenue is incidental to estimation of expenses in ordinance enforcement.

DEFENDANT'S EMPLOYMENT STATUS

The appellant next asserts that because of her status as an employee ticket-taker of the theater she is not subject to prosecution under Minneapolis Ordinance § 267.1810 for operating a motion picture theater without a license. Appellant would have this Court narrowly construe the ordinance as a specific requirement imposed only on theater owners, *c.f., People v. Siemon,* 265 App. Div. 885, 38 N.Y.S. 2d 280 (1942) (requirement that ticket prices be posted in window).

The ordinance in this case, however, cannot be so narrowly construed. The Minneapolis Ordinance places a duty upon the individual operating the theater regardless of ownership. If this duty is breached, the individual responsible should be liable for violation of the statute.

The facts adduced at trial clearly indicate that the defendant was operating the theater, as she had direct control over access to the theater. Aside from the projectionist, Mrs. Wernet was the only employee on the premises. Additionally, the appellant admitted she was operating the theater at the request of her employer. This Court, there-

fore, finds that Mrs. Wernet was operating the theater within the meaning of Minneapolis Ordinance § 267.1810.

It is also established law that an agent or employee may be convicted of operating a business without a license when he engages in a business for which his principle had failed to take out a license. *See, e.g., Edgil v. City of Carbon Hill,* 214 Ala. 532, 108 So. 355 (1926) (agent prosecuted for violation or ordinance requiring seller to obtain license). An analysis of the cases reveals clearly that where a business was controlled by a license requirement, either the principle or agent were liable for ordinance violation. *See, e.g., Waller v. City of Birmingham,* 37 Ala. 325, 67 So. 2d 421 (Ct. App. 1953); *State v. Rubenstien,* 171 Kan. 1, 228 P. 918 (1924).

In the present case Minneapolis is controlling the operation of movie theaters to ensure and protect the safety of the public. This case would therefore fall squarely within the line of cases which place responsibility upon agents and employees.

EVIDENTIARY ERROR

The final issue raised by appellant is that the trial court erred in excluding as irrelevant the cross-examination of a licensing supervisor into a previous license application of the appellant. An evidentiary ruling is within the discretion of the trial court and must not be reversed unless a clear showing of abuse of discretion is shown. *See, e.g., Renne v. Gustafson,* 292 Minn. 218, 194 N.W.2d 267 (1972). In the present case no such abuse is present. Even if the testimony as to previous license applications were admitted, it would not have provided appellant a viable defense, since

license application is not a defense to violation of a license statute. *See, e.g., Waller v. Birmingham,* 37 Ala. 325, 67 So. 2d 421 (Ct. App. 1953).

Based on this Court's finding that the Minneapolis Ordinance is constitutional and, further, that no procedural errors were committed by the trial court, this appeals panel must, and does, affirm the Municipal Court conviction of Mrs. Wernet.

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

MUNICIPAL COURT
FIRST DIVISION –
MINNEAPOLIS

State of Minnesota,
Plaintiff,
-vs-
Ferris Alexander,
Defendant,
and
State of Minnesota,
Plaintiff,
-vs-
Jean Louise Wernet,
Defendant.

MUNC. CT. #405027

ORDER

MUNC. CT #403691

The above-entitled matter, being on the Special Term calendar of the above-named Court, came on for hearing before the undersigned, on the 16th day of September, 1976, on motions to dismiss on the grounds of unconstitutionality of the City Ordinance requiring the licensing of theaters, and on motions of defendants' attorneys to dismiss on the grounds the Complaints failed to show probable cause. The Court referred these latter motions to the judges who approved said Complaints, namely, Judge Bowen in the Alexander matter and Judge Chapman in the Wernet matter.

Larry Warren, Esq., Assistant City Attorney, appeared for and on behalf of the State of Minnesota, in opposition to said motions;

Benjamin S. Houge, Esq., Attorney at Law, appeared for and on behalf of defendant Ferris Alexander, and in favor of said motions;

Randall Tigue, Esq., Attorney at Law, appeared for and on behalf of defendant Jean Louise Wernet, and in favor of said motions.

The Court, having considered the arguments of counsel and the memoranda submitted by the respective parties and being fully advised in the premises,
IT IS ORDERED that said motions with respect to the issue of constitutionality be and is in all respects denied.

BY THE COURT:

/s/ C. William Sykora
C. William Sykora
Judge of Municipal Court

Dated: At Minneapolis, Minn. this 22nd day of September, 1976.

Let the attached Memorandum be made a part of the Order herein.

State v. Wernet and State v. Alexander, Munc. Ct. Files #403691 and 405027.

MEMORANDUM

The first issue presented is whether the amendment passed May 19, 1976, to Sections 367.019 and 367.020 of the 1960

Code of Ordinances and adding Section 367.55 thereto amended the 1976 Code which became effective on May 1, 1976.

Section 1.90 of the 1976 Code provides:

> "Ordinances passed after the effective date of *this* Code shall be passed as amendments to *this* Code * * *." (Underlining supplied)

The system of numbering the various sections in the 1976 Code was changed from the system used in 1960. There is no 367 series of numbers in the 1976 Code. However, a comparison of Sections 367.019 through 367.060 of the 1960 Code with Sections 267.1800 through 267.1870 of the 1976 Code discloses their sameness.

Section 3.160 of the 1976 Code provides:

> "The catchliness of the various sections of this Code printed in boldface type are intended to indicate the contents of the section for the convenience of the reader, but shall not be construed as a part of the section."

It is obvious that the intent of the Council was to amend the 1976 Code and the numbering system, as are the catchlines, is for the "convenience of the reader."

The amendment effectively amended Sections 267.1800 and 267.1820, repealed Section 267.1810 and added a Section (267.1855) to the 1976 Code.

The issue of the defendants' standing to question the constitutionality of the ordinance here in question, when the defendant has made no effort to comply with the ordinance, is well settled and the State does not argue otherwise.

Also well settled, which the defendants do not contest, is the constitutionality of the City's right to regulate, for

health, fire, safety and zoning purposes, the buildings in which motion picture theaters are housed, to require the licensing of the theaters as a means of implementing such regulation and to levy a fee for such license to defray the cost of inspections and regulations.

Defendant contends, however, that the Minneapolis Ordinance as amended goes beyond assuring that the buildings meet the standards and is in truth and fact an attempt to regulate the content of the film shown at the theater.

Defendant also contends that the license fee required by the ordinance is not reasonably related to the expense, to the City, in effectuating any necessary regulation but is so excessive as to constitute a tax on the exercise of defendants' First Amendment right of free speech.

The defendants' third contention is that the requirement of 267.1820 (The disclosure of the names and addresses of persons who will have charge, management, or control of the business or the premises) of the ordinance has a chilling effect on the exercise of his constitutional right of freedom of speech.

A person operating or conducting a motion picture theater is entitled to the protection of the First Amendment but is subject to regulation by the City. However, such regulation is subject to limitations which do not apply when such constitutional rights are not involved. The regulating authority must have a compelling governmental interest which requires the type or kind of regulation imposed. See *N.A.A.C.P. v. Button (1963) 371 U.S. 415, 438* and *Roth v. U.S. (1957) 354 U.S. 476, 77 S. Ct. 1304.*

While the ordinance under consideration does go beyond assuring that the building housing the theater meets Code requirements, it does not go beyond permissible limits. The

ordinance as amended sets forth two substantial reasons why the need of the public for a licensing procedure override and take priority over any infringement of the defendants' rights under the First Amendment.

Section 267.1830 of the ordinance, as a condition to obtaining and retaining of a license, requires an applicant to file with the City public liability insurance policy insuring the applicant against any and all loss arising out of the use, operation or maintenance of the theater. The licensing procedure is an effective method of assuring the public of such protection.

Section 267.1870 provides for the revocation of a license upon conviction of licensee or a licensee's principal employees of a violation of Section 617.291 through 617.297 of Minnesota Statutes, of Section 385.130 of the Minneapolis Ordinances, of a felony or gross misdemeanor involving moral turpitude and prohibits certain type advertising on the exterior of a theater. A review of the Roth decision (supra) and of *Redrup v. U.S. (1967) 386 U.S. 767, 87 S. Ct. 1414* discloses the constitutionality of these prohibitory laws.

The required license fee ranges from $86.00 for a theater of 400 seats in a residential area to $1,116.00 for a theater of over 2,000 seats in a business area. No explanation was offered by the State as to why the enforcement of the regulations by inspection or otherwise would vary dependent upon the location or size of the theater but such variation is immaterial. To hold otherwise would compel the Court to place a different value pon the right to freedom of speech depending upon where it occurred, in a residential or business area, in a large or small theater. The average annual fee required for a license is not unreasonable.

It may be that the disclosure of the names and addresses required by Section 267.1820 has a chilling effect upon such

person exercising their right of freedom of speech. It would also have a deterring effect upon a desire to violate the criminal laws referred to in Section 267.1870 of the ordinance. The latter overrides and takes priority over the former.

/s/ C. W. Sykora
C. W. Sykora
Judge of Municipal Court

Dated: At Minneapolis, Minn. this 22nd day of September, 1976.

APPENDIX C

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,
Plaintiff-Respondent,

49413 vs.

Jean L. Wernet,
Defendant-Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that inasmuch as the Hennepin County District Court, upon appeal, fully considered the constitutional issues sought raised by the party, the petition for permission to appeal filed on behalf of Jean L. Wernet be, and the same is, hereby denied.

Dated: 10/23/78 [BY THE COURT]

/s/
Chief Justice

Supreme Court
Filed Oct 24 1978
John McCarthy, Clerk

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota, Plaintiff-Respondent, vs.	*	Sup. Ct. File No. 49413, Henn. Cty. Mun. Ct. File No. 66894 Mun. Ct. File No. 403691
Jean L. Wernet, Defendant-Petitioner.	*	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO: The Clerk of the Minnesota Supreme Court, the Hennepin County District Court, and the Hennepin County Municipal Court; and the above-named Plaintiff, and Ms. C. Lynne Fundingsland, Assistant City Attorney, A-1700 Hennepin County Government Center, Minneapolis, Minnesota 55487, its attorney:

PLEASE TAKE NOTICE that the above-named Defendant, by the undersigned, hereby appeals to the Supreme Court of the State of Minnesota, entered October 24, 1978, denying Defendant's Petition to appeal from the Hennepin County District Court decision of July 31, 1978, affirming Defendant's judgment of conviction in Hennepin County Municipal Court, for operating a motion picture theater without a license, in violation of Minneapolis Code of Ordinances Chapter 367.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Appellant
1108 West Broadway
Minneapolis, Minnesota 55411
Telephone: (612) 522-3359

Dated: January 16, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1979, a copy of the Notice of Appeal was mailed, postage prepaid, to Ms. C. Lynn Fundingsland, Assistant City Attorney, A-1700 Hennepin County Government Center, Minneapolis, Minnesota 55487, counsel for Respondent. I further certify that all parties required to be served have been served.

/s/ Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Appellant
1108 West Broadway
Minneapolis, Minnesota
Telephone: (612) 522-3359

Sworn to and subscribed before me
this 17th day of January, 1979.

/s/ Jackie Cherryhomes
Notary Public

[CERTIFICATE OF SERVICE]

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN

MUNICIPAL COURT
FIRST DIVISION,
MINNEAPOLIS

Wallace Cecil *being duly sworn makes complaint to the above named Court and says that he believes this information and other persons from whom it is obtained to be reliable and that probable cause exists to support a warrant of arrest for* Jean Louis Wernet
for the following reasons: Your complainant states that he is a Minneapolis Police Officer attached to the Vice Squad and that in the course of his duties he read and reviewed the report of Officer Schoeben concerning the arrest of Jean Wernet on June 7, 1976 for operating a theater without a license. Based on that report your complainant recites the following facts: that on June 7, 1976 at approximately 9:50 a.m. Officers Schoeben, Larson, and Jensen were in the vicinity of the Adonis Theater at 904 Hennepin Avenue in the City of Minneapolis and observed said theater to be open for business to the public. The officers knew that the theater had not been issued a license to operate. The officers entered and observed a party identified as Jean Louise Wernet, defendant herein, seated behind the ticket counter. After the defendant was advised of her rights, she stated to the officers that her employers told her that they could operate without a license.

OFFENSE

OPERATE THEATER WITHOUT LICENSE. 267.180.
Based upon the foregoing, complainant states that on the 7th day of June, 1976, within the corporate limits of the City of Minneapolis, Hennepin County, Minnesota, Jean Louise Wernet, then and there being the person having the

custody and control and in charge of that certain movie theater commonly known and designated as the Adonis, located at 904 Hennepin Avenue in the City of Minneapolis, did then and there operate the said movie theater without being issued a license from the City Clerk of the City of Minneapolis to so do.

contrary to the Ordinance in such case made and provided and against the peace and dignity of the State of Minnesota.

Wherefore, complainant prays that said offender may be arrested and dealt with according to law.

/s/ Wallace Cecil

Sworn to and subscribed and complained of before me this 23 day of June A.D. 1976.

Section 267.180
Charge OPERATE THEATER WITHOUT LICENSE

/s/ E. P. Chapman, Judge
Edwin P. Chapman, Judge
Judge of Municipal Court

/s/ Edward A. Backstrom
City Attorney

Recommended Bail _____

Witnesses Examined by Magistrate:

_____

APPENDIX E

Constitutional, Statutory and Municipal Ordinance Material

AMENDMENT I, United States Constitution

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV, United States Constitution

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute §617.291

Subdivision 1. In enacting sections 617.291 to 617.297 the legislature declares its purpose and intent to be as follows:

There exists an urgent need to prevent commercial exposure of minors to sexually provocative written, photographic, printed, sound or published materials as these are hereafter defined in sections 617.291 to 617.297 and which are hereby declared to be harmful to minors.

Subdivision 2. It is in the best interest of the health, welfare and safety of the citizens of this state, and especially of minors within the state, that commercial dissemi-

nation of such sexually provocative written, photographic, printed sound or published materials deemed harmful to minors be restricted to persons over the age of 17 years; or, if available to minors under the age of 18 years, that the availability of such materials be restricted to sources within established and recognized schools, churches, museums, medical clinics and physicians, hospitals, public libraries, or government sponsored organizations.

§617.292 Definitions

Subdivision 1. As used in 617.291 to 617.297 the terms defined in this section have the meanings given them.

Subd. 2. "Minor" means any person under the age of 18 years.

Subd. 3. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

Subd. 4. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's unclothed genitals, pubic area, buttocks, or, if such person be female, her breast.

Subd. 5. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

Subd. 6. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clotheed.

Subd. 7. "Harmful to minors" means the quality of any descriptionor representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(1) Predominantly appeals to the prurient, shameful or morbid interest of minors, and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(3) is utterly without redeeming social importance for minors.

Subd. 8. "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(1) the character and content of any material which is reasonably susceptible of examination by the defendant, and

(2) the age of the minor, provided however that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

617.293 Harmful materials; dissemination to minors prohibited

It is unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors.

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any mat-

ter enumerated in clause (a), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse which, taken as a whole, is harmful to minors.

617.294 Comercial exhibition prohibited

It is unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, or, sadomasochistic abuse and which is harmful to minors.

617.295 Exemptions

The following are exemptions from criminal or other action hereunder:

(a) Recognized and established schools, churches, museums, medical clinics and physicians, hospitals, public libraries, governmental agencies or quasi-governmental sponsored organizations, and persons acting in their capacity as employees or agents of such organization. For the purpose of this section "recognized and established" shall mean an organization or agency having a full time faculty and diversified curriculum in the case of a school; a church affiliated with a national or regional denomination; a licensed physician or psychiatrist or clinic of licensed physicians or psychiatrist; and in all other exempt organizations shall refer only to income tax exempted organizations which are supported in whole or in part by tax funds or which receive at least one third of their support from publicly donated funds.

(b) Individuals in a parental relationship with the minor.

(c) Motion picture machine operators, stagehands, or other theater employees such as cashiers, doormen, ushers, and concession employees, if such person or persons have no financial interest in the entertainment presented other than the salary or wage, or in any theater or place where such employee has no financial interest when his services are obtained solely for salary or wage; provided that such employee is under the direct supervision of a theater manager who is a resident of the state and who is not exempt from action under sections 617.291 to 617.297.

617.296 Penalties; injunctive remedies

Subdivision 1. A violation of any provision of sections 617.291 to 617.297 shall constitute a gross misdemeanor.

Subd. 2. Whenever any county attorney, or the attorney general of this state, has reasonable cause to believe that any person within this state is violating sections 617.291 to 617.-297, he may by verified petition seek a temporary restraining order or temporary injunction in the district court in the county in which the alleged violation occurred. No temporary restraining order or preliminary injunction shall be issued without a prior show cause notice of hearing to the respondents named in the petition, and an opportunity for the respondents to be heard. Personal service of the show cause order and of the petition made as in civil actions on the named respondents, or upon any of their employees or agents found within the state, shall constitute sufficient notice. Such show cause order for hearing may be returnable on the third day from the date of service as to a respondent who is present in this state, and on the fifth day as to a person not a resident or not found within this state.

§617.297 Evidence of adherence to motion picture rating system

In any proceeding or prosecution involving the exhibitor or owner of any motion picture theater, evidence of compliance or noncompliance with and adherence to a rating system recognized in the motion picture industry is admissible.

Minneapolis City Ordinance §870.080

It is unlawful for any person knowingly to exhibit, sell, print, offer to sell, give away, circulate, publish, distribute, or attempt to distribute, any obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, play, image, instrument, statute, drawing, or other article which is obscene. "Obscene" for the purpose of this section is defined as follows: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

Supreme Court, U. S.
FILED
MAR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1243

JEAN L. WERNET,

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

On Appeal From the Supreme Court Of The State of Minnesota

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1978

No. ———

JEAN L. WERNET,

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

On Appeal From the Supreme Court Of The State of Minnesota

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the Order of the three-judge District Court for the County of Hennepin, and the Order of the Minneapolis Supreme Court denying Appellant's petition to appeal, on the following grounds:

1. The Hennepin County District Court correctly applied principles of constitutional law enunciated by this Court.

2. The questions on which the decision of the cause rests are so insubstantial as not to require further argument.

QUESTION PRESENTED

Was the Hennepin County District Court correct in holding the Minneapolis Theater Licensing Ordinance constitutional and thereby affirming the conviction of Defendant-Appellant?

STATEMENT OF THE CASE

Appellant Jean L. Wernet was arrested on June 7, 1976, for operating a theater without a license, in violation of Minneapolis Code of Ordinances §367.010 (currently numbered as §267.1800). Appellant moved to dismiss the charges against her on the basis of the unconstitutionality of the ordinance. On September 22, 1976, the Honorable C. William Sykora, Judge of Hennepin County Municipal Court, denied Appellant's motion to dismiss, upholding the constitutionality of the theater licensing ordinance.

The matter then came on for trial on October 1, 1976, before the Honorable Daniel R. Hart, Judge of Hennepin County Municipal Court. At this time, the charge against Appellant was certified as a petty misdemeanor, which, under Minnesota Statute §609.02, Subd. 4(a), does not constitute a crime. Appellant was found guilty of having operated and conducted a moving picture theater without being licensed under the ordinance, and was fined $100.00; such fine was stayed for a period of one year.

Appellant appealed her conviction to the Hennepin County District Court. On July 31, 1978, in an Order and Memorandum, a three-judge panel unanimously affirmed the trial court's conviction of the Appellant.

On August 8, 1978, Appellant petitioned the Hennepin

County District Court for a rehearing of its Order and Memorandum dated July 31, 1978.

On September 18, 1978, the District Court entered an Order denying Appellant's motion for rehearing.

Appellant then filed a petition for permission to appeal to the Minnesota Supreme Court from the Hennepin County District Court.

On October 24, 1978, the Minnesota Supreme Court denied Appellant's petition for permission to appeal.

MINNEAPOLIS THEATER LICENSING ORDINANCE

Minneapolis Code of Ordinances §§367.010 et seq., which provide as follows:

> "367.010. License Required. No person shall operate or conduct a legitimate theater or moving picture theater without being licensed under this chapter.
>
> 367.020. Application for License. Any person desiring a license under this chapter may file with the Department of Licenses and Consumer Services an application in writing. The application shall be in such form and require such information as the department deems reasonably necessary and shall contain the following:
>
> 1) The name and home address of the applicant;
> 2) The relationship of the applicant to the business.
> 3) The name and location of the business; and
> 4) The full name, residence and address, date of birth and place of birth of each applicant, owner, manager, partner (if partnership), officer and director (if corporation), and other persons who will have charge, maintenance or control of the business or the premises.

367.025. Insurance requirements. Each applicant for a license under this chapter shall file with the City Clerk a public liability insurance policy or certificate of insurance from a company authorized to do business in Minnesota, insuring the applicant against any and all loss arising out of the use, operation or maintenance of the theater. The policy of insurance shall be in limits of not less than one hundred thousand dollars for injury or loss to one person, three thousand dollars for each occurrence, and fifty thousand dollars property damage. The policy or certificate shall contain an endorsement as provided by §300.17 under this Code of Ordinances. No cancellation of any insurance policy shall be valid except upon thirty days prior written notice to the City. Failure to keep in full force and effect, insurance required herein is grounds for revocation of the license.

367.030. City Divided into Zones. For the purpose of licenses under this chapter, the City is divided into zones entitled Zone 1, Zone 2, and Zone 3, which shall consist of the following territory:

Zone 1. All that part of the City except that portion lying between the Mississippi River and the west side of Grant Street and between Fourth Avenue North and Fourth Avenue South.

Zone 2. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the Mississippi River and the east side line of Fourth Street.

Zone 3. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the west side line of Fourth Street and the east side line of Grant Street.

367.040. License Fee. The annual fee for licenses under this chapter shall be as shown in the following table:

LICENSING OF VARIOUS ACTIVITIES

Size of Theater	Zone 1	Zone 2	Zone 3
Up to 400 Seats	$ 72	$ 95	$235
401 to 600 Seats	95	118	279
601 to 1,000 Seats	118	140	373
1,001 to 1,500 Seats	140	189	467
1,501 to 2,000 Seats	140	235	557
Over 2,000 Seats	140	235	930

367.050. Expiration Date. All licenses shall expire on October 1 of each year.

367.055. Denial of Application. An application may be denied, after notice and hearing thereon, for any of the following reasons:

1) The application contains false, fraudulent or deceptive statements.

2) The applicant has not complied with any provision of this chapter.

3) The proposed operation is not in compliance with any law relating to zoning, health, fire, building or safety requirements.

4) The applicant or owner, manager, partner, officer or director of the business, has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a theater.

367.060. Revocation of License. Any license issue under this chapter may be revoked in accordance with §16, chapter 4 of the City Charter.

Conviction of the licensee or the licensee's principal employees for a violation of Minnesota Statutes, §617.291 through 617.297, or a conviction for a violation of the Minneapolis Code of Ordinances, §870.080, shall constitute grounds for suspension or revocation of the theater license.

Advertising by the licensee on the exterior of a theater by means of any picture, photograph, drawing, or similar visual representation, or image of a person or portions of the human body which depicts nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, as defined in Minn. Stat. §617.292 on any theater shall constitute grounds for suspension or revocation of the theater license."

ARGUMENT

I.

THE DENIAL PROVISIONS OF THE MINNEAPOLIS THEATER LICENSING ORDINANCE CLEARLY MEET CONSTITUTIONAL STANDARDS.

It is well established that cities can license motion picture theaters, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1966); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In *Young*, this Court stated:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young*, 427 U.S. at 62.

Therefore, the issue is not, as Appellant contends, that First Amendment rights, as they attach to commercial movies are so fundamental as to be immune from valid regulation under police power. The issue is whether a regulatory scheme which deals with First Amendment rights, such as theater licensing, is reasonably related to a substantial governmental interest, and whether that scheme is narrowly drawn to accomplish a specific purpose. *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966).

A. THE DENIAL PROVISIONS ARE DIRECTLY RELATED TO A LEGITIMATE AND SUBSTANTIAL GOVERNMENTAL INTEREST.

The Minneapolis Theater Licensing Ordinance is written to provide for the health, safety and comfort of all screen and stage theater patrons, as well as the general public. That the City of Minneapolis has a legitimate and substantial governmental interest in its health and safety responsibilities, is not open to question. The propriety of furthering such interests by requiring theaters to conform to health, building, electrical, fire and safety standards, likewise cannot be questioned. *Chemline, Inc.*, supra at 728.

However, the City's health and safety interests in the operation of a screen or stage theater extend beyond merely determining whether those theaters are in compliance with zoning, fire, health, and building codes at the time of license application. The city also has a substantial interest in being able to locate persons responsible for the operation of a theater in case of an emergency, in assuring that the theater will be financially responsible for accidents or injuries to persons or property, and in acting to prevent the occurrence or repetition of substantial health and safety hazards.

The power of a municipality to require a license to protect its substantial interests implies the power to deny a license for sufficient cause. *Erwin v. City of Dallas,* 85 F. Supp. 103 (N.D. Tex. 1949). Minneapolis Theater Licensing Ordinance §367.055 enumerates four specific reasons for which a license application may be denied. The ordinance applies equally to all types of theaters. Not one of the bases for denial even tangentially authorizes the denial of a theater license for reasons of content. In fact, the Hennepin County District Court specifically held that the grounds specified for denial relate directly to the City's interest in its citizens' health and safety (see J.S. App. A at 4a).

B. DISCRETION TO DENY A LICENSE IS SUFFICIENTLY LIMITED SUCH THAT THE DENIAL PROVISIONS DO NOT CONSTITUTE A PRIOR RESTRAINT ON FREEDOM OF EXPRESSION.

To avoid an unconstitutional prior restraint on First Amendment rights, the regulatory scheme must have "narrow, objective, and definite standards to guide the licensing authority", in the decision to grant or deny a license. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969). Appellant contends that the Minneapolis Theater Licensing Ordinance is unconstitutional on its face. A reasonable reading of the ordinance shows that this regulatory scheme is factually distinguishable from the cases upon which Appellant relies in her Jurisdictional Statement. In the cases Appellant cites, the licensing authorities had uncontrolled discretion to grant or deny licenses and permits. *Lovell v. City of Griffin,* 303 U.S. 444 (1938); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943); and *Staub v. City of Baxley,* 355 U.S. 313 (1958).

The Minneapolis Theater Licensing Ordinance sufficiently circumscribes the discretionary powers of the City Council by delineating four specific, unambiguous grounds for which a theater license may be denied. The Hennepin County District Court, after considering exhaustive briefs, agreed with the City's position. (See J.S. App. A at 4a). Appellee submits that these standards do not allow the decision to deny a license to be based on content of the expression or on a subjective evaluation of the applicant's character.

It is well settled that a city council cannot act arbitrarily, capriciously, or unreasonably, and that its administrative decisions are subject to judicial review. *Wajda v. City of Minneapolis,* 310 Minn. 339, 246 N.W.2d 455 at 457 (1976). Considering the health and safety interests of the City and the type of regulation necessary to further these interests, it would be difficult, if not impossible, to write an ordinance that does not call for some exercise of judgment.

From the jury trial, through the state appellate procedure, and now before this Court, the appellant has not shown which of the denial provisions fail to meet narrow, specific and definite standards. Neither has she shown that these denial provisions fail to relate to the City's health and safety interests. Appellee submits that, absent such a showing, Appellant's contention that the denial provisions of the Minneapolis Theater Licensing Ordinance are unconstitutional raises no substantial federal questions meriting review by this Court.

II.

APPELLANT LACKS STANDING TO CHALLENGE THE REVOCATION PROVISION OF THE MINNEAPOLIS THEATER LICENSING ORDINANCE.

A. APPELLANT HAS FAILED TO PROVE THAT THE REVOCATION PROVISIONS OF THE MINNEAPOLIS THETER LICENSING ORDINANCE HAS CAUSED, OR IS LIKELY TO CAUSE, INJURY.

It is well settled that the constitutionality of laws may only be challenged by persons who have sustained, or who are immediately in danger of sustaining, some direct injury as the result of the enforcement of a certain law. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). This injury must be real, as distinguished from being remote, general, or hypothetical. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). More recently, this court has stated that, for a person to have standing, ". . . an individual must present more than 'allegations of a subjective chill.' There must be a 'claim of specific present objective harm or a threat of specific future harm.' " *Bigelow v. Virginia*, 421 U.S. 809 (1975), citing *Laird v. Tatum*, 408 U.S. 1 (1972).

Appellant in this case lacks standing to challenge the constitutionality of the revocation provision of the Minneapolis Theater Licensing Ordinance, in that she has shown no injury or likelihood of injury to be caused by the operation of the revocation provision. Appellant has never obtained a license to operate the theater in question. Having never obtained a license, Appellant cannot be heard to contend that she has been injured by the provision regarding license revocation.

Appellant furthermore has not shown in what manner she may be injured by the revocation provision. As stated in *Bigelow*, supra, to have standing to challenge a law when there is no claim of specific present harm, the Appellant must prove a threat of specific future harm. The burden of proving the nature and immediacy of a future harm has not been met by the Appellant.

B. APPELLANT IS LIMITED TO CHALLENGING THE CONSTITUTIONALITY OF ONLY THAT PART OF THE ORDINANCE WHICH CAUSES, OR MAY CAUSE, INJURY.

A corollary of the general standing principle is that, if the law which is sought to be challenged contains separable provisions, the party may challenge only those provisions which operate to cause harm. A party cannot be heard to challenge those provisions which do not cause injury and are not likely to cause injury. *Bell v. Hongisto*, 501 F.2d 346 (9th Cir. 1974).

This Court has held that constitutional attacks on licensing statutes are permissible by persons who have not applied for a license and whose conduct, under a properly drawn statute, would be prohibited. *Freedman v. Maryland*, 380 U.S. 51 (1965). However, in *Star v. Preller*, 352 F. Supp. 530 (D. Md. 1972), vacated on other grounds, 413 U.S. 905 (1973), the court denied plaintiff standing to challenge those licensing provisions regarding revocation, and restricted the challenge to only those sections which led up to and resulted in a license being granted or denied.

The Hennepin County District Court applied the law as set forth in *Freedman*, supra, and *Star*, supra, and con-

cluded that revocation provisions may only be challenged when interdependent with remaining provisions, or where the revocation section contributes to the infirmity of the other sections (see J.S. App. A at 6a). That court found neither requisite present in this case and denied Appellant standing to challenge the revocation provision. The Minnesota Supreme Court found no reason to overturn this ruling.

Appellant relies heavily upon the decision in *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (1975), to support her contention that she has standing to challenge the constitutionality of the revocation provision of the Minneapolis Theater Licensing Ordinance. In *Alexander*, supra, the city was seeking to revoke that appellant's license. Therefore, the appellant in *Alexander* clearly had standing to challenge the revocation provision of the ordinance. In addition, the other cases cited by Appellant do not deal directly with the issue of standing which is presented here.

Appellee submits that Appellant lacks standing to challenge the revocation provision of the Minneapolis Theater Licensing Ordinance. Lacking standing, Appellant raises no substantial federal question meriting review by the Court.

III.

THE MINNEAPOLIS THEATER LICENSING ORDINANCE FEE SYSTEM IS CONSTITUTIONAL IN THAT IT IS DESIGNED TO DEFRAY THE COSTS OF FURTHERING A SUBSTANTIAL GOVERNMENTAL INTEREST.

It is well established that where cities can regulate business activities, they may also require the payment of a li-

cense fee to cover the cost of that regulation, and to offset increased municipal expenses resulting from the operation of the business. *Chemline, Inc.*, supra, *Lyons v. City of Minneapolis*, 241 Minn. 439, 63 N.W.2d 585 (1954). It is also well established that persons attacking the validity of an ordinance which imposes license fees have the burden of proof of showing that the fees are excessive. *Lyons*, 63 N.W 2d at 589.

Appellant, in this case, has done no more than to assert that the license fees bear no reasonable relation to the costs of furthering the City's health and safety interests. Even had Appellant gone beyond this mere assertion, Appellee submits that the City established the reasonableness of its fee system in the lower courts. The Hennepin County District Court agreed with the City. (See J.S. App. A at 7a). The Minnesota Supreme Court found no reason to review this finding.

Under the Minneapolis Theater Licensing Ordinance, the distinctions in the fee schedule are by location and size. Certainly, the City Council, in passing this ordinance, could reasonably have concluded that theaters of different sizes and in different areas impose different costs on the City. This is particularly obvious in light of the fact that the zones with the highest fees encompass theaters where the buildings are older, density is much higher, and access problems are more acute. It becomes apparent that inspection, police and fire protection costs in these zones are greater than in other zones. Therefore, the fee system is reasonable in that it is rationally based upon costs involved in providing these services.

Appellant at trial, as District Court Appellant, and now, while before this Court, has made no factual showing of

the excessiveness of the fees. Appellant has clearly failed to sustain her burden of proof and Appellee urges that this issue does not constitute a substantial federal question meriting review by this Court.

IV.

APPELLANT HAS FAILED TO PROVE THAT THE MINNEAPOLIS THEATER LICENSING ORDINANCE DISCLOSURE REQUIREMENTS HAVE A SUBSTANTIAL "CHILLING EFFECT" UPON FIRST AMENDMENT RIGHTS.

A. APPELLANT HAS FAILED TO MAKE THE FACTUAL SHOWING REQUIRED TO RAISE THE ISSUE OF CHILLING EFFECT" ON FIRST AMENDMENT FREEDOMS.

Appellant alleges that the disclosure requirements of the Minneapolis Theater Licensing Ordinance operate as a chilling effect upon the exercise of First Amendment rights. The standards set forth in *NAACP v. Alabama,* 357 U.S. 449 (1958), and reaffirmed in *Buckley v. Valeo,* 424 U.S. 1 (1976), clearly states that there must be alleged a specific "chill" to a definable group of people, and a factual showing of "chilling effect" before a court will consider the issue.

This Court has used a balancing test to determine whether the reasons advanced for the enactment of statutes or ordinances are constitutionally sufficient to justify the possible deterrent effect upon the exercise of First Amendment freedoms. In *Buckley,* supra, this Court stated that disclosure requirements of ordinances or statutes must serve substantial governmental interests. When this Court has found the governmental interest insufficient to support

the disclosure requirements, this Court has stressed the fact that the disclosure involved was compelled disclosure of membership in groups engaged in advocacy, and that such disclosure might deter peaceful discussions of public matters of importance. *NAACP v. Alabama,* supra; *Buckley,* supra; *Talley v. California,* 362 U.S. 60 (1960).

Appellant does not state what individual rights are burdened by the ordinance disclosure requirements. She does not suggest in what way the burden upon individual rights is greater than the governmental interest. Appellant does not claim to represent, be a member of a group, or to be herself engaged in the dissemination of ideas where identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. In fact, Appellant has made no showing whatsoever of any "chilling effect" on the exercise of her First Amendment rights. In order to be heard to challenge the ordinance in such a fashion, Appellant must set forth more than allegations of a "subjective chill." *Bigelow v. Virginia,* supra. Appellant has done no more here than to merely allege some vague "chill" upon First Amendment rights.

B. THE CITY'S INTEREST IN HEALTH AND SAFETY IS SUFFICIENT TO OVERCOME ANY SLIGHT "CHILLING EFFECT" ON FIRST AMENDMENT RIGHTS INVOLVED IN THIS LIMITED DISCLOSURE.

Appellee submits that, even if Appellant had made a factual showing of a "chilling effect", the City's interests here are substantial enough to outweigh any "chilling effect" on First Amendment rights. If a "chilling effect" exists, there must be a "relevant correlation" or "substantial relation" between the governmental interest and the infor-

mation required to be disclosed. *Buckley*, supra. The City's interest in preserving the health and safety of people attending commercial theaters is directly related to the request that names and addresses of persons in control of the theater be disclosed on the theater license application. Birthdates and places of birth are also directly related to the City's interest as a means of verifying the legal ages of persons operating theaters. These disclosure requirments are minimal in nature and apply to all theaters in the City of Minneapolis.

Cases cited by Appellant are inapplicable to this case. In those decisions, this Court could not find a substantial relation between the governmental interest and the information sought to be disclosed. The language of this Court makes it clear that the "chilling effect" in those cases was a result of the infringement upon associational rights and beliefs. Such is not the case here. Further, none of these cases dealt with situations involving theaters open to the public. The City has a legitimate right to protect the public which may attend these theaters.

Appellee, therefore, submits that Appellant has failed to prove a definable "chill" as required by this Court. Appellee further submits that the disclosure provision does not create a "chilling effect", in that it is substantially related to the City's health and safety interests. Therefore, Appellant has raised no new questions which merit review by this Court.

CONCLUSION

The Hennepin County District Court properly applied the principles enunciated in the decisions of this Court. Since that court opinion is not in conflict with decisions of this Court or of any other court, the appeal herein should be dismissed or the decision of the Hennepin County District Court should be summarily affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

Supreme Court, U. S.
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No. 78-1243

Jean L. Wernet,

Appellant,

vs.

State of Minnesota,

Respondent.

ON APPEAL FROM SUPREME COURT

OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 1243

Jean L. Wernet,

Appellant,

vs.

State of Minnesota,

Respondent.

ON APPEAL FROM SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO MOTION TO DISMISS
OR AFFIRM

Appellant, by the undersigned, hereby opposes Appellee's Motion to Dismiss or Affirm the judgment of the Supreme Court of the State of Minnesota in the above-entitled matter, and submits the following Brief in opposition. To the extent that arguments raised in Appellee's Motion to Dismiss or Affirm are not dealt with in this Brief, reliance is made upon the arguments already advanced in Appellant's Jurisdictional Statement.

I.

THE MINNEAPOLIS THEATER LICENSING ORDINANCE IS FACIALLY UNCONSTITUTIONAL AS A PRIOR RESTRAINT ON FREEDOM OF EXPRESSION, AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN THAT IT PERMITS DENIAL OF A MOTION PICTURE THEATER LICENSE, IN THE DISCRETION OF THE CITY COUNCIL, UPON A SHOWING THAT A SINGLE PERSON ASSOCIATED WITH OPERATION OF THE THEATER HAS BEEN CONVICTED WITHIN THE PAST THREE YEARS OF ANY LAW RELATING TO ZONING, HEALTH, FIRE, BUILDING OR SAFETY IN THE OPERATION OF A THEATER.

As noted in the Jurisdictional Statement, Minneapolis City Ordinance §367.055(4) permits the denial of a license upon a showing that any applicant, owner, manager, partner, officer, or director of the business has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a theater.

In its Motion to dismiss or affirm, Appellee argues apparently that once such a violation is demonstrated, it is within the discretion of the City Council to grant or deny a license. See Motion to dismiss or affirm, at pp. 8-9. Thus, the City Council, in its discretion, may deny a license to a theater, simply because it does not like the contents of motion pictures being shown, so long as some health, safety, zoning, or building violation (such as failure to update fire extinguishers,

or to fix leaky pipes on time) is shown. Thus, the Ordinance does not remove from government the discretion to grant or deny a license, but rather simply requires a building code violation to trigger the exercise of that discretion.

The ordinance, on its face, authorizes no specific guidelines to govern the exercise of that discretion, or to assure that criteria such as the content of films being shown are not used in the exercise of that discretion.

Thus, Appellee's assertion that the standards "do not allow the decision to deny a license be based on content of the expression or on a subjective evaluation of the applicant's character" is simply not true. Once even the most trivial code violation is established, the ordinance authorizes a denial of a license in the absolute discretion of the City Council. It is precisely this ability on the part of government officials to exercise judgment on whether to grant a license to exercise a First Amendment right that this Court has repeatedly condemned.

For example, in Cantwell v. Connecticut, 310 U.S. 296 (1939), this Court

held unconstitutional a state statute prohibiting any person from soliciting money or anything of value for an alleged charitable or philanthropic cause, without a permit, when the statute gave to a state official discretion to decide whether a cause was religious or not. In explaining the constitutional infirmity of the provision, this Court stated:

> "It will be noted, however, that the act requires an application to the Secretary of the Public Welfare Council of the state; that he is empowered to determine whether the cause is a religious one, and that the issue of the certificate depends upon his affirmative action. . . . . He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion." Id. at 322-323.

Thus, this Court has prohibited precisely the type of conduct which this ordinance permits, to-wit: the exercise of judgment and the formation of an opinion by a city official as to whether or not a license should issue.

Similarly, it is no defense to argue, as does Appellee, that post-denial remedies will be available if the City Council abuses its discretion. In none of the cases

cited in the Jurisdictional Statement or this brief was the availability of post-denial remedies for abuse of discretion a defense to a facial attack on the constitutionality of an ordinance because it permits the exercise of discretion on the question of whether First Amendment activity is to be allowed.

II.

THE MINNEAPOLIS THEATER LICENSING ORDINANCE IS FURTHER UNCONSTITUTIONAL BECAUSE THE FEE SYSTEM IMPOSES AN UNLAWFUL PRIOR RESTRAINT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS WITHIN THE CITY OF MINNEAPOLIS, AND FURTHER DENIES TO CERTAIN THEATERS EQUAL PROTECTION OF THE LAWS, UNDER THE FOURTEENTH AMENDMENT.

In the Jurisdictional Statement, Appellant noted wide disparity in fees as set forth in the ordinance, in which some theaters may pay license fees nearly 13 times greater than other theaters situated elsewhere in the City. Appellee does not dispute this fact.

Nor does Appellee apparently dispute the fact that Appellee, at no stage in the proceeding, offered any evidence or made any explanation to justify this disparity in fees. Nor does Appellee dispute the fact that the trial court, in this case the Hennepin County Municipal Court, specifically found that the City had offered no evidence or explanation to

justify the fees imposed.

The sole basis Appellee argues for rejecting the challenge to the fee system is the general proposition of law, that persons attacking the validity of an ordinance which imposes license fees have the burden of proof of showing fees to be excessive. While there is no dispute that this is true as a general proposition of licenseing law, the authorities cited in the Jurisdictional Statement clearly establish that where the activity sought to be licensed is entitled to First Amendment protection, the opposite proposition applies, to-wit: that the government has the burden of proving the reasonableness of the fees and the failure to submit evidence must result in a finding that the fees are excessive and constitute attacks on First Amendment rights. Appellee cites no authority to the contrary in the First Amendment area. In addition to the cases cited in the Jurisdictional Statement, this Court's attention should be directed to Bayside Enterprises, Inc. v. Carson, 450 F.Supp. 696 (M.D. Fla. 1978), in which the court held unconstitutional as

as a prior restraint on First Amendment rights, license fees on adult bookstores and theaters very similar in nature to those involved in the instant cases. As did the other cases cited in the Jurisdictional Statement, the court in Bayside Enterprises, Inc. v. Carson, supra, also clearly held that the burden was upon the government to justify a fee limiting First Amendment activities, and held that mere conclusionary testimony as to the anticipated cost of enforcing the ordinance was insufficient to meet the burden. See Id. at 704-706. In this case, not even the conclusionary testimony was offered.

In this regard, the Court's attention should also be directed to International Society for Krishna Consciousness of Western Pennsylvania, Inc. v. Griffin, 437 F.Supp. 666 (W.D. Pa. 1977), in which a $10 per day license fee for solicitation at an airport was held to be an unconstitutional prior restraint on free expression. Thus, all authority on the subject clearly indicates that in the First Amendment area, the burden of proof of the reasonableness of a license fee rests upon the

government, and the failure of government to introduce evidence to justify the fee mandates a finding of unreasonableness. These cases, coupled with the Municipal Court's clear finding in this case that no evidence to justify the fee had been offered by the government, mandates a reversal of Appellant's conviction.

Certainly, at minimum, the constitutionality of the fee system is a Federal question of sufficient substantiality to warrant denial of Appellee's Motion to dismiss or affirm.

III.

THE MINNEAPOLIS THEATER LICENSEING ORDINANCE IS FURTHER UNCONSTITUTIONAL, IN THAT THE DISCLOSURE PROVISIONS HAVE A CHILLING EFFECT ON CONSTITUTIONALLY PROTECTED FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION, AND THEREFORE VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its Motion to affirm, Appellee makes two arguments as to why Appellant's contention that the disclosure requirements of the licensing ordinance are unconstitutional and should be rejected. Both arguments are without merit.

The first argument is that Appellant did not make a sufficient "factual showing" that First Amendment rights would be chilled.

In this regard, Appellee relies upon the decision of this Court in Buckley v. Valeo, 424 U.S. 1 (1976).

Reliance on Buckley v. Valeo, supra, in this regard,is misplaced. Neither the Buckley case, nor its predecessors relied upon, held that conditioning the exercise of First Amendment rights on disclosure of ownership or authorship necessitates any showing that a definable group has had its First Amendment rights chilled. To the contrary, in Buckley, and the cases preceding it, this Court has repeatedly held that the right to exercise free speech and free press includes a right to do so anonymously, and that disclosure requirements are looked upon with great scrutiny. Only when the disclosure requirements serve substantial governmental interests and are narrowly drawn to limit disclosure to that necessary to serve that substantial government interest will disclosure requirements be upheld. It is only after the substantial government interest and a reasonable relationship have been demonstrated by government, that it becomes necessary for those subject to the disclosure requirement to demonstrate

a specific chilling effect. Since no reasonable relationship to a substantial government purpose has been demonstrated in this case, there is no requirement of a factual showing of "chill" on the part of Appellant.

This leads to the second assertion, that of the substantiality of the government's interest.

In this regard, the Court should keep in mind its own admonition in Shelton v. Tucker, 364 U.S. 479 (1960):

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved (footnote omitted). The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose (footnote omitted)." Id. at 488.

To be sure, the City has legitimate health and safety concerns about the operation of a theater. It also has concern about the financial responsibility of the operators of the theater. However, these concerns are more than adequately met by the insurance requirement of the ordinance, (see §367.025), by disclosure

of the fee owner, and by requirement of disclosure of the name of a person to contact with problems. Compelled disclosure of every person in any way connected with the theater's operation is by no means required to meet whatever legitimate health and safety interest the City may have in the theater. The availability of a less drastic means to accomplish the same purpose clearly renders unconstitutional the broad disclosure provisions.

In this regard, this Court's attention should also be directed to Natco Theaters, Inc. v. Ratner, U.S. Dist. Ct., Southern Dist. of New York, File No. 78 Civ. 5391 (February 5, 1979), an opinion which is unreported as of yet, but a copy of which is attached hereto and incorporated by reference as if fully set forth herein. In that case, the court held unconstitutional as a prior restraint on freedom of expression disclosure requirements very similar to the requirements of the instant case, particularly noting that the requirements could be taken in conjunction with license denial and revocation requirements very similar to those present in the instant case.

Clearly, the constitutionality of the disclosure requirements is a substantial Federal question which this Court should resolve.

CONCLUSION

For the reasons set forth above, as well as those contained in Appellant's original Jurisdictional Statement, probable jurisdiction in this regard should be noted.

Respectfully submitted,

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Attorney for Appellant

Dated: March 15, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATCO THEATERS, INC.,

Plaintiff,

-against-

BRUCE RATNER, as Commissioner of Department of Consumer Affairs of the City of New York, ALLEN G. SCHWARTZ, as Corporation Counsel for the City of New York and ROBERT MCGUIRE, as Police Commissioner of the City of New York,

Defendants.

AMENDMENT TO OPINION

78 Civ. 5391 (GLG)

G O E T T E L , D. J.:

The opinion dated January 12, 1979, in the above-entitled action, is to be amended as follows:

1) Page 4, line 8 from bottom -- Boe v. Callelo, should read Boe v. Collelo.

2) Page 6, line 5 from bottom -- 283 U.S. 687, should read 283 U.S. 697.

3) Page 7, line 2 -- 402 U.S. 92, 101, should read 408 U.S. 92, 101.

4) Page 8, line 9 -- section B32-26.5(B), should read section B32-26.0,subd.a, par.5(B).

5) Page 10, line 5 --Paragraph 5 of section B32-26.0, should read Paragraph 5 of section B32-26.0, subd a (also cited page 12, near middle of page; again on page 12, line 14; page 15, line 4; and page 17, line 1.)

6) Footnote 18, line 5 -- 250 N.Y. 193, should read 250 N.Y. 173.

7) Footnote 18, line 3 from bottom -- United States v. Mattassini, should read United States v. Matassini.

SO ORDERED:

Dated: New York, N.Y.,
February 5, 1979.

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATCO THEATERS, INC., Plaintiff, -against- BRUCE RATNER, as Commissioner of Department of Consumer Affairs of the City of New York, ALLEN G. SCHWARTZ, as Corporation Counsel for the City of New York and ROBERT MCGUIRE, as Police Commissioner of the City of New York, Defendants.	*	78 Civ. 5391 (GLG) OPINION

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G O E T T E L, D. J.:

In this action brought under 42 U.S.C. §1983, the plaintiff, Natco Theaters, Inc., is challenging the constitutionality of New York City's licensing scheme for motion picture theaters,[1] seeking both declaratory and injunctive relief. Plaintiff, the lessee and operatory of the Bryant Theater in New York's Times Square area, has stated its intention of exhibiting "sexually explicit" films. It contends that enforcement of the licensing law would unconstitutionally infringe its rights under the First Amendment. The defendants, the New York City Commissioner of the Department of Consumer Affairs, Police Commissioner, and Corporation Counsel, have moved to dismiss the complaint.

After argument on an order to show cause, this Court issued a temporary restraining order enjoining enforcement of the relevant provisions of the licensing ordinance. After further briefing, the plaintiff's motion for a preliminary injunction is now ready for decision.

I.

The ordinance challenged in the instant case is the successor to an earlier licensing ordinance declared by the courts to be an unconstitutional prior restraint on First Amendment rights.[2] The new ordinance attempts to deal with the problems found in the old law by providing "specific guidelines" for the issuance, renewal, suspension and revocation of movie theater licenses.[3] Under the terms of the present ordinance the Commissioner of the Deaprtment of Consumer Affairs may deny, suspend or revoke a license only after notice and ahearing and only upon a finding that at least one of eight enumerated conditions has occurred.[4] These conditions include, among others, a failure of the applicant to satisfy the ordinance's disclosure provisions and a prior conviction of the applicant or the business's principals (including all shareholders holding ten percent or more of its stock) for any one of a number of crimes.[5]

The licensing ordinance went into effect in December of 1977. On May 10, 1978,

a letter was sent by the Department of Consumer Affairs to theater operators informing them of the licensing requirements. The letter stated: "A strict program of enforcement is about to begin, and the strongest possible actions may be taken against any enterprises that are operating without appropriate licenses."[6] Those found to be in violation of the law are subject to both criminal and civil (including injunctive) sanctions. The plaintiff alleges, and the defendant does not deny, that several criminal summons have already been served upon various theaters for noncompliance.

Plaintiff has not applied for, nor does it with, under the terms of the present ordinance, to apply for a license. Plaintiff now fears that as a result it will become a target for enforcement of the ordinance soon after it reopens its theater.

II

This Court must first decide whether plaintiff has the requisite standing and presents an actual "case or controversy"

as mandated by the Constitution. As noted in Able v. Markle, 452 F.2d 1121, 1124 (2d Cir. 1971), "[t]he existence of a case or controversy depends upon whether the persons seeking relief have alleged a sufficient personal stake in the outcome to assure that the court will be called upon to resolve real issues between genuine adversaries rather than merely to give advisory opinions with respect to abstract or theoretical questions." See Baker v. Carr, 369 U.S. 186, 204 (1962).

The plaintiff has not, as yet, applied for, and thus has never been denied, a license, nor has it ever been subject to any of the sanctions of the ordinance. This, however, does not deprive it of standing. It has been held consistently that such failure to apply for a license, even if that license could have been obtained, does not preclude a party from challenging the constitutionality of a licensing ordinance on its face. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969); Freedman v. Maryland, 380 U.S. 51, 56 (1965); 414 Theater Corp. v. Murphy, 360 F.Supp. 34 (S.D.N.Y. 1973),

aff'd, 499 F.2d 1155 (2d Cir. 1974). As was stated by the Supreme Court in Shuttlesworth, supra at 151, quoting from Jones v. Opelika, 316 U.S. 584, 602 (Stone C.J., dissenting), adopted per curiam on rehearing 319 U.S. 103, 104: "The Constitution can hardly be though to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yet yielded to its demands."

Similarly, the fact that plaintiff has not as yet been subject to any of the sanctions of the ordinance does not deprive it of standing in light of the circumstances in this case. The plaintiff has received an official letter from the Department of Consumer Affairs threatening enforcement against any theater operating without a license. Other similarly situated theaters have apparently already been served with criminal summonses. Unlike in St. Martin's Press, Inc. v. Carey, No. 77-7603, slip op. at 5356, (2d Cir. Jan. 10, 1978), the instant ordinance clearly applies to the plaintiff, and, due to the nature of the movies plaintiff

plans to offer, it is a likely target for enforcement. Under such circumstances, this Court does not feel it "necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." Steffel v. Thompson, 415 U.S. 452, 459 (1974). See Craig v. Boren, 429 U.S. 190 (1976).[7] Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (standing based upon threat of enforcement made to federal plaintiff); Boe v. Callelo, 438 F.Supp. 145, 153 (S.D.N.Y. 1977). Plaintiff has presented this Court with a claim which "cannot be characterized as 'imaginary or speculative." Steffel v. Thompson, supra at 459, quoting Younger v. Harris, 401 U.S. 37, 42 (1971).

For the foregoing reasons the Court finds that there exists an actual "case or controversy" sufficient to make this case justiciable.

The next question to consider is whether in light of the doctrine of Younger v. Harris, supra, this Court should decline to exercise jurisdiction. At this time there is no state proceeding pending which plaintiff seeks to have enjoined. Nor will this case disturb the results of a prior state action. It has been held that where a real threat of prosecution exists a federal court may grant injunctive relief without regard to Younger principles. Wooley v. Maynard, 430 U.S. 705, 709-710 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922, 930-931 (1975). This Court may take jurisdiction over this action.

Nor must the Court abstain from the exercise of its jurisdiction over the Pullman abstention doctrine. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). Pullman abstention is appropriate when the challenged state ordinance is susceptible to a limiting construction by a state court so as to avoid the constitutional infirmity. See, Zwickler v. Koota, 389 U.S. 241 (1967);

Pharmaceutical Society of New York v. Lefkowitz, No. 78-7326 (2d Cir. Nov. 1, 1978). However, "[w]here there is no ambiguity in the state statute, the Federal court should not abstain but should proceed to decide the federal constitutional claim." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971). Thus the state courts do not have to be given the first opportunity in all instances to review state statutes. See Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Abstention has been held to be particularly inappropriate when an ordinance is challenged as facially invalid under the First Amendment. Citizens For a Better Environment, Inc. v. Nassau County, 488 F.2d 1353, 1362 (2d Cir. 1973). The New York City licensing ordinance challenged in the instant case is clear on its face. This Court can see no construction which could be put on the law by the state courts which could either avoid or modify the constitutional issues presented.[8] We therefore decline to abstain.

III

It has long been established that motion pictures are a form of expression protected by the First Amendment. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Kingsely Pictures Corp. v. Regents, 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). It has also been held consistently by the Supreme Court that although a system of prior restraint is not unconstitutional per se, such a system "comes to this Court bearing a heavy presumption against its constitutional validity." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 588 (1975); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 687 (1931). Any attempt to regulate presumptively protected expression must be done with precision, Interstate Circuit, Inc. v. Dallas, 390 U.S. at 682; NAACP v. Button, 371 U.S. 415, 438 (1963); in order not to "sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288,

307 (1964); See Police Department of the City of Chicago v. Mosley, 402 U.S. 92, 101 (1972); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Shelton v. Tucker, 364 U.S. 479, 488-489 (1960).

Under the terms of section B32-26.0 of the ordinance, the commissioner may refuse to issue a license only after notice and hearing and only upon a finding that at least one of eight enumerated conditions has occurred. Paragraph Five provides that the commissioner may refuse a license if it is found that:

> "the applicant, licensee, its officers, principals, directors and stockholders owning more than ten per cent of the stock of the corporation have been conviced to [sic]:
>
> (A) any of the following offenses and there is a direct relationship between the offense and the conduct of a motion picture theater:
> (i) an offense within article two hundred and [sic] the penal law relating to bribery involving public servants;
> (ii) a felony within article two hundred ten of the penal law relating to perjury;
> (iii) an offense within article two hundred thirty of the penal law relating to prostitution offenses;
> (v) an offense within section 260.20 of the penal law relating to unlawfully dealing with a child;

> (C) any offense which is a misdemeanor involving the premises on or in which the licensed business is to be conducted;"

Under this provision a license may be denied if the applicant or one of its officers, principals, directors or ten percent stockholders has been convicted of any of a host of criminal offenses, both related and unrelated to the operation of a movie theater. Thus a prior conviction of one of those parties for violating the state obscenity law,[9] which involved the premises, or a conviction for violating the federal obscenity laws,[10] would likely result in the denial of a license. Similarly, a plain reading of section B32-26.5(B) would indicate that any offense which would be a felony if committed in New York, including such disparate crimes as assult in the first or second degree,[11] and forgery in the first or second degree,[12] could be the basis for a license denial.

In the landmark case of Near v. Minnesota, 283 U.S. 697 (1931), the Supreme Court was faced with a statute under which future publication of a newspaper could be suppressed because of past publication of

scandalous and defamatory material.[13] In holding the statute to be an unconstitutional prior restraint ("the essence of censorship"), the Court noted: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity of the press from previous restraint in dealing with official misconduct." The Court concluded that the appropriate remedy when dealing with an alleged abuse of a party by its privileges under the First Amendment is subsequent punishment, if available, for the act, and not the placing a prior restraint on publishing itself.

A regulatory scheme under which a license necessary to exercise of First Amendment rights may be denied or revoked because of a past conviction for any felony (and for certain misdemeanors), constitutes a system of prior restraint. Such a scheme is constitutionally suspect and subject to the closest scrutiny. Faced with such systems of restraint the highest courts of three states, California, Perrine v. Municipal Court, 5 Cal. 3d 656, 488 P.2d 648, 97 Cal. Rptr. 320 (1971), cert. denied, 404 U.S.

1038 (1972),[14] Washington, Seattle v. Bittner, 81 Wash. 2d 747, 505 P.2d 126 (1973),[15] and Minnesota, Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975)[16] have held licensing ordinances to be unconstitutional. In each case the court held it impermissible to deny a person the right to exercise a fundamental freedom (by denying a license to operate a First Amendment related business such as a bookstore or movie theater) solely upon the ground that that person has suffered a prior criminal conviction. In such situations the appropriate remedy is not to inhibit the right to sell a book or exhibit a movie, but rather, where applicable, to prosecute for violation of the obscenity laws. See Oregon Bookmark Corp. v. Schrunk, 321 F.Supp. 639 (D. Ore 1970) (holding unconstitutional a municipal ordinance under which all establishments exhibiting obscene material could be declared to be public nuisances and which could thereby be abated by the city council).

Cf. Universal Amusement Co. v. Vance, 559 F.2d 1286 (5th Cir. 1977), reh. granted, 559 F.2d 1303. See also People v. Taub, 37 N.Y. 2d 530, 337 N.E. 2d 754, 375 N.Y.S. 2d 303 (1975).

Paragraph 5 of section B32-26.0 of the challenged ordinance suffers from the same infirmities as did the ordinances found to be unconstitutional in Perrine, Bittner and Alexander. This Court is now faced with a new attempt by a municipality to utilize its licensing authority (by creating a standard based upon prior conduct) in order to rid itself of undesirable, though not unsafe, establishments. In doing so, the City of New York has created a system of prior restraint that cannot survive constitutional scrutiny.[17]

The City has argued that the power to deny or revoke a theater license because of a prior conviction "which tends to show moral or intellectual unfitness" comes within its traditional authority to protect the public health, safety and well-being.[18] But as

the court noted in Oregon Bookmark Corp. v. Schrunk, 321 F.Supp. at 642: "It is one thing to abate the sale of filthy food and another to abate the sale of filthy books. The food business is not protected by the First Amendment." When licensing an activity protected by the First Amendment the City's authority is far more circumscribed. The City may not, as it has tried to do, utilize its licensing power to deprive a party of the right to exercise a constitutionally protected right solely because of past misconduct.

Nor can this Court accept the City's contention that the theater licensing law read in pari materia with sections 752 and 753 of the New York Correction Law,[19] can be given so limiting a construction as to be able to survive constitutional scrutiny. The City argues that if those sections, and the challenged ordinance, are so read, then a license could not be denied because of a prior conviction unless there is a direct relationship between the offense and the license sought, or if issuing such license would pose a risk to the public health, safety or welfare. There is, however,

under which certain non-speech related crimes (for example arson or criminal negligence) would serve as the basis for denying a license. As the licensing ordinance now stands, the City has not even attempted to make such a showing of clear and present danger. This Court, therefore, holds paragraph 5 of section B32-26.0, Article 2, Chapter 32 of the Administrative Code of the City of New York unconstitutional on its face.[20]

IV

Another basis for denying a license under the ordinance is failure on the part of the applicant to satisfy the disclosure requirements contained in paragraph 1 of section B32-26.0. Under the terms of that provision the Commissioner may deny a license if it is found that:

> "the applicant, licensee, its officers, principals, directors and stockholders owning more than ten percent of the outstanding stock of the corporation have not submitted complete and accurate information required by the department in connection with:
>
> (A) an application for a license or renewal thereof;
> (B) an application for the approval of a change of ownership;

> (C) the furnishing of a record of convictions for offenses as provided in paragraph five of this subsection;
> (D) the furnishing of financial information and records by the applicant, licensee, its officers, principals, directors and stockholders owning more than ten percent of the outstanding stock of the corporation concerning the source of funds used or intended to be used in the operation of the licensed business and the amount of total funds each such individual has invested in the business."

The plaintiff contends that forcing it to divulge the information called for by the ordinance would have the effect of infringing upon its right of association protected by the First Amendment. In this regard it has been held by the Supreme Court that, "compelled disclosure, in itself, can seriously infringe on freedom of association and belief guaranteed by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 64 (1976). See Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button ,371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Figari v. New York Telephone Co., 32 A.D. 2d 434, 303 N.Y.S. 2d 245 (2d Dept. 1969).

no need to reach the qeustion of whether such construction should be given since even if the Court were to accept the defendants' argument the ordinance would still fall as an unconstitutional prior restraint. Under this limited reading of the ordinance, for example, a prior obscenity conviction (as for exhibiting obscene films) would still be a ground to deny a license, since such conviction could be said to bear a direct relationship to the license sought. But to deny a person the right to exercise rights provided by the First Amendment because of past abuse of those rights is precisely the type of infringement on a fundamental freedom which the courts have consistently struck down.

A system of prior restraint based upon past convictions can only be sustained if it is shown that granting a license to an individual wich such a record would present a clear and prsent danger of serious substantive evil. Perrine v. Municipal Court, 5 Cal. 3d at 664, 448 P.2d at 654, 97 Cal. Rptr. at 324. The Court need not reach the question whether this standard could be met were the City to draft a narrow ordinance

Similarly, to be advanced by association pertain to political, economic, religious or cultural matters." NAACP v. Alabama, supra. at 460.

In order for a governmental instrumentality to be constitutionally able to infringe upon this right it is necessary that there be shown a substantial relationship between the information sought to be disclosed and a significant governmental interest to be furthered by such disclosure. Buckley v. Valeo, 424 U.S. at 64; Gibson v. Florida Legislative Comm., 372 U.S. at 546; NAACP v. Alabama, 357 U.S. at 463. This strict standard has been enunciated by the Supreme Court as a result of its fear of the effect disclosure would have on individuals and groups involved in the advocacy of unpopular political ideas.[21] Such a strict standard need not necessarily apply when the type of association involved is one in which individuals have joined together for the purpose of engaging in profit making activity (as opposed to advocacy of ideas) and when the speech in question is that which was found by the plurality in Young v. American Mini Theaters, 427 U.S. 50, 70 (1976), to be a

"type of expression [which] is of a wholly different and lesser magnitude than the interest in untrammelled political debate." It is not necessary, however, to decide at this time what the appropriate standard in this situation should be since regardless of the criteria used the disclosure provision as it now stands is too broad to be upheld. This is particularly apparent when the provision is read in conjunction with that part of the ordinance which the Court has found to be an unconstitutional prior restraint.

It has been held that when a statute involves infringement on First Amendment rights "[t]he breadth of [that] legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). Thus, while the Court believes that the City may be able, in a more narrowly drawn ordinance, and upon a greater showing of governmental interest than was presented as to this provision, to require disclosure of unidentified principles and such other information as could be

specifically related to the need to insure the safe and lawful operation of a movie theater,[22] the information sought in this provision, as to all convictions covered in Paragraph Five of B32-26.0, which, as we noted earlier, do not have to be related to the safe operation of a movie theater, and as to the source of all funds used or intended to be used by any principle in the operation of the theater, goes too far.[23] The City in this respect has, in addition, made only a minimal effort to demonstrate the need for such extensive disclosure. The Court therefore holds the disclosure provision of section B32-26.0 of the licensing ordinance to be unconstitutional.[24]

V.

The test to be applied on a motion for a preliminary injunction is clear. Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976); Sonestra Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). In light of the Court's finding of unconstitutionality as to parts of the ordinance, plaintiff has shown probability of success on the merits. As to

irreparable harm the plaintiff has been placed by this unconstitutional ordinance in the position of having to choose between operating its theater without a license, and thereby subjecting itself to the risk of criminal and civil penalties, or foregoing the exercise of its First Amendment rights. In 414 Theater v. Murphy, 499 F.2d at 1160, the court stated:

> "The latter possibility . . . involves a deprivation of [plaintiff's] and the public's first amendment right to show and view films, and in itself constitutes irreparable injury justifying injunctive relief, because there is no means to make up for the irretrievable loss of that which would have been expressed. . . . Moreover, the other option - violating the law to exercise one's constitutional rights and awaiting the sure hand of the law - itself may cause, as it is alleged to cause, irreparable injury both economic . . . and personal . . . ."

See St. Martin's Press, Inc. v. Carey, 440 F. Supp. at 1203-1204, (S.D.N.Y. 1977), rev'd on other grounds, No. 77-7603 (2d Cir. Jan. 10, 1978). Since the Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes injury," Elrod v. Burns, 427 U.S. 347, 373 (1976), the Court finds that plaintiff faces the risk of irreparable injury as a

result of the City's unconstitutional ordinance.

CONCLUSION

In reaching the conclusions stated in this opinion the Court has not been unaware of the problems facing New York City in reagrds to "adult" movie theaters. The 42nd Street -- Times Square area has become an ugly wormhole in the "Big Apple." The Court is cognizant of the blighting effect such establishments have upon neighborhoods, and would applaud innovative approaches developed by the City to deal with such problems. However, such approaches must be consistent with the dictates of the Constitution. The prior conviction provision of paragraph 1, and the disclosure provision of paragraph 5, both of section B32-26.0 of Title B, Article 2, Chapter 32 of the Administrative Code of New York have gone beyond permissible constitutional boundaries. Accordingly, the Court denies defendant's motion to dismiss and grants plaintiff's motion to the extent of enjoining enforcement of those provisions found to be unconstitutional.[25]

SO ORDERED:

U.S.D.J.

Dated: New York, N.Y.,
January 12, 1979.

FOOTNOTES

i

1/ Sections B32-22.0 through B32-26.0 of Title B, Article 2, Chapter 32 of the Administrative Code of the City of New York (the "ordinance").

2/ Avon 42nd Street Corp. v. Meyerson, 352 F.Supp. 994 (S.D.N.Y. 1972). A companion provision, relating to "peep shows" was also held unconstitutional by both federal, 414 Theater Corp. v. Murphy, 360 F.Supp. 34 (S.D.N.Y. 1973), aff'd 499 F.2d 1155 (2d Cir. 1974), and state, People v. Mitchell, 74 Misc. 2d 1053, 346 N.Y.S. 2d 495 (N.Y.C. Cr. Ct. 1973), courts. These ordinances were held unconstitutional because of their failure to provide the Commissioner of the Department of Consumer Affairs with ascertainable standards by which to exercise his power to issue, suspend, or revoke licenses.

3/ Report of the Committee on Consumer Affairs in Favor of Approving and Adopting as Amended a Local Law to Amend the Administrative Code of the City of New York, in Relation to the Licensing of

Exhibititions and Performances and Motion Picture Exhibitions. G.O. No. 103 - Int. No. 1061-A. Minutes of the New York City Council, November 29, 1977.

4/ The eight conditions are set out in section B32-26.0 of the ordinance.

5/ While section B32-25.0 authorizes the Commissioner to "pass upon the character of the applicant," such authority is now, unlike the previous ordinance, limited by the eight enumerated conditions of section B32.26.0, and no license may be denied an applicant except upon the occurrance of at least one of those factors. While there may still be some problem of excessive discretion in this ordinance as it now stands, the Court believes that this can be cured by state court interpretation and need not be considered at this time.

6/ Letter from the Department of Consumer Affairs of the City of New York to "Theater Operators" (May 10, 1978) (plaintiff's Exhibit A).

7/ The Court held in Craig: "The legal duties created by the statutory section under challenge are addressed directly to vendors such as the appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of hèr buyers' market, or to disobey the statutory command and suffer . . . 'sanctions and perhaps loss of license.' . . . This Court repeatedly has recognized that such injuries estalbish the threshold requirements of a 'case or controversy' mandated by Art. III." 429 U.S. at 194.

8/ In a prior action involving part of the former New York City licensing law the district court chose to abstain from exercising its jurisdiction so as to permit the matter to be litigated in state court. After the state court had had such opportunity, see City of New York v. S&H Book Shop, Inc., 41 App. Div. 2d 637, 341 N.Y.S. 2d 292 (1st Dept. 1973), the district court reasserted jurisdiction upon a renewed application for relief since

the "state courts have had ample opportunity to consider the question in related cases and have declined to do so." 414 Theater Corp. v. Murphy, 360 F.Supp. at 36.

9/ Under N.Y. Penal Law §235.05 (McKinney, 1967) a person is guilty of obscenity when:

> "Knowing its content and character, he:
>
> (1) Promotes, or possesses with intent to promote any obscene material; or
>
> (2) Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.
>
> Obscenity is a class A misdemeanor."

10/ The federal obscenity laws include 18 U.S.C.:

§1461. Mailing obscene or crime inciting matter.

§1462. Importation or transportation of obscene matter.

§1463. Mailing indecent matter on wrappers or envelopes.

§1464. Broadcasting obscene language.

§1465. Transportation of obscene matters for sale or distribution.

11/ N.Y. Penal Law §§120.05, 120.10 (McKinney, 1975).

12/ N.Y. Penal Law §§170.10, 170.15 (McKinney 1975).

13/ Chapter 285 of the Session Laws of Minnesota, Section 1, read, in pertinent part, that anyone (individual or firm):

> "engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away
>
> (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
>
> (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided."

14/ Under the terms of the California ordinance a person could be denied a license to operate a bookstore as a result of a past conviction for any of certain enumerated crimes.

15/ The Washington ordinance mandated denial of a license to operate a theater if the applicant, or any of its officers (if a corporation) had within ten years of the application been convicted of a felony or a misdemeanor involving moral turpitude or intent to defraud.

16/ The Minnesota ordinance permitted rescission of a license to operate a theater if the license, owner, manager, lessee or one of the employees or a person with a financial interest in the theater had been convicted of an obscenity offense which was relevant to the operation of the theater.

17/ In enacting a provision so similar to ones found unconstitutional by the highest courts of three separate states this Court is led to wonder, as did the Court of Appeals in 414 Theater Corp. v. Murphy, 499 F.2d at 1158, "whether the threat of the ordinance is not of more concern to the City than its validity."

18/ The cases which have been cited by the City to support this position pertain to state authority to license lawyers, Matter of Glucksman, 57 A.D. 2d 205, 394 N.Y.S. 2d 191 (1st Dept. 1977); and pharmacists, Matter of Mandel v. Board of Regents, 250 N.Y. 193 (1928); or to qualifications which have been mandated for issuance of a gun permit, United States v. Mattassini, 565 F.2d 1297 (5th Cir. 1978), and not to the licensing of an activity protected by the First Amendment.

19/ N.Y. Correc. Law §§752, 753 (McKinney Supp. 1978-79). In pertinent part those sections read:

> §752 Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited.
>
> No application for any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:
> (1) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or of the general public.
>
> §753. Factors to be considered concerning a previous criminal conviction; presumption
>
> 1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:
>
> (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought.
(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
(d) The time which has elapsed since the occurrence of the offense or offenses.
(e) the age of the person at the time of occurrence of the criminal offense or offenses.
(f) The seriousness of the offense or offenses.
(g) Any information produced by the person or produced on his behalf, in regard to his rehabilitation and good conduct.
(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

20/ The plaintiff has stated its intention of showing "sexually explicit" motion pictures. Should any of those films be adjudged obscene and thus not entitled to First Amendment protection, Miller v. California, 413 U.S. 15 (1973); Paris Adult Theaters v. Slaton, 413 U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957), the City could, at that point, restrain the showing of those obscene films and punish those found guilty of exhibiting them.

21/ This standard was enunciated in cases such as Buckley v. Valeo, supra, which dealt with disclosure of the names of political campaign contributors, and Gibson v. Florida Legislative Comm., supra, and NAACP v. Alabama, supra, which dealth with disclosure of N.A.A.C.P. membership lists. See Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 326 U.S. 60 (1960).

22/ A statute requiring disclosure of certain, limited, types of crimes, such as arson, criminal negligence, or promoting prostitution (N.Y. Penal L. §§230.150-230.30) and certain limited financial information which would relate to a party's ability to meet the cost of operating a safe theater, such as the existence of any large scale outstanding indebtedness, might, if narrowly drawn, survive constitutional scrutiny.

23/ The question as to the validity of the financial disclosure provision is, on its face, a close one. Since, however, the Department of Consumer Affairs has given this provision a very broad construction,

requiring the filing of extensive and detailed financial data, and such construction has been implicitly upheld by the state courts, Matter of Pussycat Cinema v. Ranter, No. 5764 (N.Y. Sup. Ct. N.Y. County, June 21, 1978) (unreported opinion), the provision, as it has been interpreted, is invalid.

24/ Plaintiff has also raised equal protection objections to this ordinance. Since, however, the challenged provisions have been found unconstitutional on other grounds, the Court sees no need to reach the equal protection issue here.

25/ Despite the fact that plaintiff has challenged all of sections B32-22.0 through B32-26.0 of the ordinance, the Court finds no constitutional violations in the ordinance except as to the provisions discussed in the opinion. There is no doubt that the City has the authority to license movie theaters. See Matter of Small v. Moss, 279 N.Y. 288 (1938). Since the unconstitutional provisions are severable, the Court will not disturb the remainder of the ordinance so long as it is interpreted in a manner consistent with this opinion.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 1243

Jean L. Wernet,

Appellant,

vs.

State of Minnesota,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I have served by First Class Mail three copies of the attached Brief in Opposition to Motion to Dismiss or Affirm in the above-entitled case, on the following counsel of record this day of , 1979.

Mr. Robert Alfton, Minneapolis City Attorney, A-1700 Hennepin County Government Center, Minneapolis, Minnesota 55487

Randall Tigue

Randall Tigue

Sworn to and subscribed before me

this day of , 1979.

Notary Public

JACKIE CHERRYHOMES
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Commission Expires Oct. 17, 1985